(7)

No. 04-1414
Title: United States, Petitioner
v.
Jeffrey Grubbs
Docketed: April 21, 2005
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (03-10311)
Decision Date: July 26, 2004
Rehearing Denied: December 6, 2004
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Feb 24 2005	Application (04A734) to extend the time to file a petition for a writ of certiorari from March 6, 2005 to April 5, 2005, submitted to Justice O'Connor.
Feb 24 2005	Application (04A734) granted by Justice O'Connor extending the time to file until April 5, 2005.
Mar 23 2005	Application (04A734) to extend further the time from April 5, 2005 to May 5, 2005, submitted to Justice O'Connor.
Mar 23 2005	Application (04A734) granted by Justice O'Connor extending the time to file until May 5, 2005.
Apr 21 2005	Petition for a writ of certiorari filed. (Response due May 23, 2005)
May 12 2005	Order extending time to file response to petition to and including June 20, 2005.
Jun 20 2005	Brief of respondent Jeffrey Grubbs in opposition filed.
Jun 20 2005	Motion for leave to proceed in forma pauperis filed by respondent.
Jul 6 2005	DISTRIBUTED for Conference of September 26, 2005.
Jul 6 2005	Reply of petitioner United States filed. (Distributed)
Sep 27 2005	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Sep 27 2005	Petition GRANTED.
Nov 1 2005	SET FOR ARGUMENT ON Wednesday, January 18, 2006.
Nov 11 2005	Record received from U.S.C.A. 9th Circuit. (1 envelope)
Nov 14 2005	Joint appendix filed.
Nov 14 2005	Brief of petitioner United States filed.
Nov 17 2005	CIRCULATED.
Nov 23 2005	Record received from U.S.D.C. for Eastern Dist. of California. (1 box)
Dec 16 2005	Brief amicus curiae of National Association of Federal Defenders filed. (Distributed)
Dec 19 2005	Brief of respondent Jeffrey Grubbs filed. (Distributed)
Dec 19 2005	Brief amici curiae of National Association of Criminal Defense Lawyers and George C. Thomas III filed. (Distributed)
Jan 5 2006	Motion to appoint counsel filed by respondent Jeffrey Grubbs.
Jan 11 2006	Reply of petitioner United States filed. (Distributed)
Jan 18 2006	Argued. For petitioner: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D.C. For respondent: Mark J. Reichel, Sacramento, Cal.

Supreme Court, U.S.
FILED

041414 APR 21 2005

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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY GRUBBS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Amendment requires suppression of evidence when officers conduct a search under an anticipatory warrant *after* the warrant's triggering condition is satisfied, but the triggering condition is not set forth either in the warrant itself or in an affidavit that is both incorporated into the warrant and shown to the person whose property is being searched.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 3a-19a) is reported at 377 F.3d 1072. An order of the court of appeals amending its opinion and denying rehearing (App., *infra*, 1a-2a) is reported at 389 F.3d 1306. The memoranda and orders of the district court denying respondent's motion to suppress (App., *infra*, 29a-46a) and denying his motion for reconsideration (App., *infra*, 20a-28a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 2004, and amended on December 6, 2004. A petition for rehearing was denied on December 6, 2004. On February 24, 2005, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including April 5, 2005, and on March 23, 2005, she further extended the time within which to file a petition for a writ of certiorari to and including May 5, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

1. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Rule 41 of the Federal Rules of Criminal Procedure is reproduced at App., *infra*, 78a-83a.

STATEMENT

Following the denial of a suppression motion and a conditional guilty plea in the United States District Court for the Eastern District of California, respondent was convicted of receiving in the mail a visual depiction whose production involved the use of a minor engaged in sexually explicit conduct, in violation of 18 U.S.C. 2252(a)(2). He was sentenced to 33 months of imprisonment, to be followed by three years of supervised release, and a fine of $3700. The court of appeals reversed, holding that the search of respondent's home violated the Fourth Amendment.

1. An anticipatory search warrant is "a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place." 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.7(c), at 362 (3d ed. 1996). An anticipatory search warrant is most commonly issued in a case involving "the anticipated mail delivery to a certain address of a package known or reasonably believed to contain some form of contraband," and execution of the warrant ordinarily occurs "after the police determine * * * that the predicted delivery has actually occurred." *Id.* at 362-363. Because the Fourth Amendment requires probable cause to believe that evidence of a crime "can likely be found at the described locus *at the time of the search*," not at the time the warrant is issued, *United States* v. *Ricciardelli*, 998 F.2d 8, 10 (1st Cir. 1993), the federal courts of appeals have uniformly concluded that anticipatory search warrants are constitutionally permissible, see, *e.g.*, *United States* v. *Santa*, 236 F.3d 662, 671-672 (11th Cir. 2000) (citing cases).

2. a. On December 20, 2001, respondent contacted a website that offered for sale videotapes depicting minors engaged in sex acts. App., *infra*, 29a-30a, 59a-60a. The website was operated by an undercover United States Postal Inspector. *Ibid.* A week later, respondent placed an e-mail order for a videotape titled "Lolita Mother and Daughter," which depicted (according to the website) "a lovely young girl"—"if she's over 10 I'd be shocked"—engaged in sex acts with "Mom." *Id.* at 4a, 30a, 63a-64a. On February 5, 2002, the postal inspector received an envelope in his undercover post office box. *Id.* at 30a, 67a. The envelope

contained $45 in cash and a handwritten letter reading: "I hope this makes it to you please send film asap thanks Jeff Grubbs 1199 Park Tarrace [sic] Dr., Galt, CA 95632." *Id.* at 4a, 30a, 67a (brackets in original).

b. On April 17, 2002, Postal Inspector Gary Welsh applied to a magistrate judge in the Eastern District of California for an anticipatory warrant to search respondent's home after the delivery of the videotape. App., *infra*, 4a, 30a, 52a-77a. The triggering condition for the search was described in two different places in the supporting affidavit. Paragraph 14 of the affidavit stated that the warrant would be executed if respondent "or any other individual at the residence accepts the mail package containing the videotape and takes it into 1199 Park Terrace Drive, Galt, CA 95632." *Id.* at 57a. Paragraph 61 stated that the warrant would not be executed "unless and until the parcel has been received by a person(s) and has been physically taken into the residence located at 1199 Park Terrace Drive, Galt, CA 95632." *Id.* at 72a. Paragraph 61 went on to say that the warrant would be executed "[a]t that time, and not before." *Ibid.* "Attachment A" to the affidavit was a detailed description of the property to be searched, and "Attachment B" was a detailed list of the items to be seized. *Id.* at 74a-77a.

On the basis of the affidavit, the magistrate judge issued the warrant. App., *infra*, 4a, 30a, 47a-51a. The warrant had the same two attachments as the affidavit (describing the property to be searched and the items to be seized), and directed that it be executed within 10 days (*i.e.*, on or before April 27, 2002). *Id.* at 7a-8a, 47a-51a. At the top of the warrant, the word "ANTICIPATORY" was handwritten above the pre-printed words "SEARCH WARRANT," but the warrant itself

did not describe the triggering event. *Id.* at 5a, 30a, 47a.

c. On April 19, 2002, at approximately 7:20 a.m., an undercover postal inspector delivered the videotape to respondent's house. Respondent's wife accepted delivery, signed for the package, and took it inside. A few minutes later, postal inspectors saw respondent leaving and told him to stay where he was. The warrant was then executed. Shortly after the search began, Inspector Welsh said to respondent, "You know why we're here." Respondent said that he did and told Inspector Welsh that the package was in the garage. App., *infra*, 6a-7a, 31a.

At approximately 7:50 a.m., respondent went back into the house with Inspector Welsh, who gave respondent a copy of the warrant. Although the postal inspectors had a copy of the supporting affidavit with them, it was not presented to respondent and it was not left at his house. App., *infra*, 7a-8a, 31a-32a.

After they went inside, Inspector Welsh advised respondent of his rights, and respondent agreed to be interviewed. Respondent also consented to a search of his computer, CD-ROMs, and diskettes. During the interview, respondent admitted that he had ordered the videotape and that he had other child pornography. Respondent was then placed under arrest. The postal inspectors seized the videotape and a number of other items. App., *infra*, 8a, 32a.

3. A grand jury in the Eastern District of California returned a one-count indictment charging respondent with receipt of child pornography, in violation of 18 U.S.C. 2252(a)(2). App., *infra*, 8a-9a, 32a. Respondent filed a motion to suppress the physical evidence seized from his house and the statements he made to Inspector Welsh. *Id.* at 9a, 29a. One of the claims in

respondent's motion was that "the agents' failure to present the affidavit to [him] or his wife rendered the warrant inoperative," because the warrant did not describe the triggering event. *Id.* at 9a.

After an evidentiary hearing, the district court denied the motion to suppress. App., *infra*, 29a-46a. In rejecting the claim that suppression was required because respondent had not been given a copy of the affidavit (*id.* at 36a-39a), the court applied the Ninth Circuit's decision in *United States* v. *Hotal*, 143 F.3d 1223 (1998). As the district court observed (App., *infra*, 37a), that case held that "an anticipatory search warrant must either on its face or on the face of the accompanying affidavit[] clearly, expressly, and narrowly specify the triggering event," and that the document specifying the triggering event must be in the "immediate possession" of those conducting the search. 143 F.3d at 1227. The district court concluded that the requirements of *Hotal* were satisfied, because "the triggering event [wa]s specified in the affidavit," "[t]he warrant incorporated the affidavit," and "[t]he warrant and affidavit were * * * in the immediate possession of the officers while they searched [respondent's] residence." App., *infra*, 37a. The court rejected respondent's contention that *Hotal* "requires the affidavit to be presented with the warrant to the people whose property is being searched." *Id.* at 38a.[1]

[1] The district court also ruled that there was probable cause for the issuance of the warrant insofar as it authorized a search for the videotape (App., *infra*, 32a-35a); that the postal inspectors' failure to provide a copy of the warrant at the outset of the search did not require suppression under Rule 41 of the Federal Rules of Criminal Procedure (App., *infra*, 39a-44a); and that respondent's statements were not obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966) (App., *infra*, 44a-46a). In his suppression motion, respondent also contended that there was no probable cause for the issuance of the warrant insofar as it authorized a search for items other than the videotape and that he had not validly consented to the search of his computer, but the court ruled that those claims were moot, because the government did not intend to offer at trial any physical evidence other than the videotape. *Id.* at 35a-36a.

Respondent filed a motion for reconsideration, which the district court denied. App., *infra*, 20a-28a. Respondent then entered a conditional guilty plea (see Fed. R. Crim. P. 11(a)(2)) to the sole charge in the indictment, reserving his right to appeal the denial of his suppression motion. App., *infra*, 10a. The district court sentenced him to a prison term of 33 months. *Ibid.*

4. The court of appeals reversed the denial of respondent's suppression motion and remanded the case to give respondent an opportunity to withdraw his plea. App., *infra*, 1a, 3a-19a.

In an opinion by Judge Reinhardt, the court first observed that the Fourth Amendment requires that warrants "particularly describ[e] the place to be searched[] and the persons or things to be seized." App., *infra*, 10a. The court went on to say that a warrant that violates this "particularity requirement," and is therefore "facially defective," can be "cured" by an affidavit that (a) is "sufficiently incorporated" into the warrant and (b) "accompanies" the warrant. *Id.* at 12a. But a defect in the warrant "is not cured," the court said, if the affidavit "is not shown to the persons being subjected to the search." *Ibid.*

Relying on the Ninth Circuit's decision in *Hotal*, the court then explained that "the particularity requirement of the Fourth Amendment applies with full force to the conditions precedent to an anticipatory search warrant." App., *infra*, 13a. Thus, the rule in the Ninth

Circuit is that, "when a warrant's execution is dependent on the occurrence of one or more conditions, the warrant itself must state the conditions precedent to its execution and these conditions must be clear, explicit, and narrow." *Ibid.* (quoting *Hotal*, 143 F.3d at 1226). The rationale for the rule, the court said, is that "a warrant conditioned on a future event presents a potential for abuse above and beyond that which exists in more traditional settings," because, "inevitably, the executing agents are called upon to determine when and where the triggering event specified in the warrant has actually occurred." *Ibid.* (quoting *Hotal*, 143 F.3d at 1226, in turn quoting *Ricciardelli*, 998 F.2d at 12)). In the Ninth Circuit's view, application of the particularity requirement is "the only way effectively to safeguard against unreasonable and unbounded searches." *Ibid.* (quoting *Hotal*, 143 F.3d at 1227).

Combining these two principles—that the Fourth Amendment's particularity requirement is violated if the triggering condition is not described in an anticipatory search warrant, and that a warrant that violates the particularity requirement can be "cured" by an incorporated affidavit that "accompanies" the warrant —the court of appeals framed the question presented as "whether a curative affidavit that contains the conditions precedent to an anticipatory search actually 'accompanies' the warrant when the affidavit is not shown to the person or persons being subjected to the search." App., *infra*, 14a. The court answered that question no. It held that officers must "present any curative document—be it an affidavit, attachment, or other instrument that supplies the particularity and specificity demanded by the Fourth Amendment—to the persons whose property is to be subjected to the search." *Id.* at 15a. Unless the curative document is

presented, the court said, "individuals w[ill] 'stand [no] real chance of policing the officers' conduct,'" because "they w[ill] have no opportunity to check whether the triggering events by which the impartial magistrate has limited the officers' discretion have actually occurred." *Ibid.* (quoting *Ramirez* v. *Butte-Silver Bow County*, 298 F.3d 1022, 1027 (9th Cir. 2002), aff'd *sub nom. Groh* v. *Ramirez*, 540 U.S. 551 (2004)).

Under that analysis, the court concluded that the warrant in this case was "inoperative," and that the search was therefore "illegal," because "there is no dispute that the officers failed to present the affidavit—the only document in which the triggering conditions were listed—to [respondent] or [his wife]." App., *infra*, 16a. Nor did it matter, the court said, that "the search ultimately may have been conducted in a manner consistent with the application for the warrant." *Ibid.* The court explained that, "[i]f a warrant fails for lack of particularity or specificity, it is simply unconstitutional—without regard to what actually occurred." *Ibid.* The result, in the court's view, was that the officers in this case "in effect[] conducted a warrantless search." *Id.* at 17a. The court therefore held that all evidence, including the videotape and respondent's statements, must be suppressed. *Id.* at 17a & n.10.[2]

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has interpreted the Fourth Amendment to require suppression whenever the triggering condition for an anticipatory search warrant is

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[2] Respondent also raised in the court of appeals the Rule 41 and *Miranda* claims he had raised in the district court (Resp. C.A. Br. 17-18, 31-34), but the Ninth Circuit did not reach those claims (App., *infra*, 4a n.1, 7a n.3, 16a n.9).

not specified either in the warrant itself or in a supporting affidavit that is both incorporated into the warrant and left with the person whose property is being searched. That rule is incorrect; it has been rejected by five other circuits; and it has recurring importance in the administration of the criminal justice system. This Court should therefore grant certiorari to review the Ninth Circuit's decision.

A. The Ninth Circuit's Decision Is Incorrect

1. a. As this Court observed last Term, the Warrant Clause of the Fourth Amendment has "four[] requirement[s]." *Groh* v. *Ramirez*, 540 U.S. 551, 557 (2004). It provides that "no Warrants shall issue, but [1] upon probable cause, [2] supported by Oath or affirmation, and particularly describing [3] the place to be searched, and [4] the persons or things to be seized." U.S. Const. Amend. IV. The fundamental flaw in the Ninth Circuit's rule is that it adds a fifth requirement. Contrary to the court of appeals' holding that "the particularity requirement of the Fourth Amendment applies with full force to the conditions precedent to an anticipatory search warrant" (App., *infra*, 13a), the text of the Warrant Clause makes clear that the particularity requirement does *not* apply to those conditions. The only items that the Fourth Amendment requires to be "particularly describ[ed]" in a warrant are "the place to be searched" and "the persons or things to be seized." The triggering condition has nothing to do with where a search may take place or what the officers may search for.

Instead, the triggering condition is "the predicted future event[] that the magistrate judge determines will create sufficient probable cause to justify the search." App., *infra*, 13a. That is not the concern of the

particularity requirement. Rather, the triggering condition is relevant to the requirement that the warrant be based on probable cause and supported by sworn testimony. Accordingly, while the Fourth Amendment requires that the triggering condition be described in the supporting affidavit, which is made under "Oath" and submitted to the magistrate judge to establish "probable cause," it does not require that the triggering condition be described in the warrant, which must "particularly describ[e]" only the "place to be searched" and the "things to be seized." Since the affidavit in this case described the probable cause for the search, including the triggering condition (*id.* at 57a, 72a), and the warrant (and its attachments) described with particularity the place to be searched and the items to be seized (*id.* at 47a-51a), the requirements of the Warrant Clause were satisfied.

b. The rule adopted by the Ninth Circuit is based, not on the text of the Fourth Amendment (or its history), but on non-constitutional policy arguments. In *Hotal*, for example, the court said that, insofar as it applies to the items to be seized, the Fourth Amendment's particularity requirement "serve[s] the purposes of, first, ensuring that the 'discretion of the officers executing the warrant is limited,' and second, informing the person subject to the search of what items are authorized to be seized." 143 F.3d at 1227 (quoting *United States* v. *Towne*, 997 F.2d 537, 548 (9th Cir. 1993)). From that statement, the court extrapolated that "[i]t is equally important to ensure that all parties be advised when the search may first take place, and the conditions upon the occurrence of which the search is authorized and may lawfully be instituted." *Ibid.* The text of the Fourth Amendment, however, does not require warrants to describe with particularity

"when the search may first take place" (*ibid.*), and that omission is telling evidence that those who framed and ratified the Bill of Rights did not believe that advising a person of that fact was "equally [as] important" (*ibid.*) as advising him of what property may be searched and what things may be seized. Even if the Ninth Circuit could point to some evidence that the framers or ratifiers of the Fourth Amendment shared the court's view (something it has not done), the evidence would have little relevance given the specificity of the constitutional text, which states that it is "the place to be searched" and "the persons or things to be seized" that must be described with particularity.

In *Hotal* the Ninth Circuit also said, and in this case it repeated, that applying the particularity requirement to the triggering condition for an anticipatory search warrant is "the only way effectively to safeguard against unreasonable and unbounded searches." 143 F.3d at 1227; App., *infra*, 13a. In a similar vein, the decision below reasoned that, if residents were not made aware of the triggering condition at the time of the search, they "would 'stand [no] real chance of policing the officers' conduct.'" *Id.* at 15a (quoting *Ramirez*, 298 F.3d at 1027). This second policy argument likewise provides no basis for ignoring the text of the Warrant Clause, and it is based on an incorrect premise. Informing a person whose property is being searched of the triggering condition is manifestly not the only (or even the most) effective way to prevent unreasonable searches. If a search took place before the occurrence of a triggering event described to the magistrate in an affidavit, probable cause would be lacking and the search would likely be unreasonable (and therefore illegal). The appropriate way to resolve a dispute about probable cause, however, is through litigation, not by

confronting law enforcement agents who are poised to execute a warrant. The best "safeguard against unreasonable * * * searches" (*id.* at 13a) is a motion to suppress (in a criminal case) or a claim for damages (in a civil case), not, as the Ninth Circuit has put it, "challeng[ing] officers," at the time of the search, who are believed to have "exceeded the limits" of their authority (*Ramirez*, 298 F.3d at 1027).

2. If there is any defect in an anticipatory search warrant that authorizes a search *from the date of the warrant's issuance* until some future date, without requiring that the search take place only after the triggering event, the defect is that the warrant is overbroad—not with respect to the place to be searched or the items to be seized, but with respect to the time at which the search may occur. That is because the warrant, on its face, authorizes a search before the triggering event has occurred, and thus before there is probable cause for the search. In a case of that type, however, the warrant is not invalid on its face, and suppression is not an appropriate remedy for overbreadth if the search *in fact* occurred *after* the triggering event.

As a general matter, when a magistrate judge "issue[s] a warrant authorizing a search and seizure which exceeds the ambit of the probable cause showing made to him," courts sever the parts of the warrant "that are invalid for lack of probable cause" and suppress only the evidence "seized under the authority of those parts." *United States* v. *Christine*, 687 F.2d 749, 753-754 (3d Cir. 1982). The Ninth Circuit itself has recognized that principle. *E.g.*, *In re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847, 857-858 (1991). Insofar as the warrant in this case authorized a search of respondent's residence both (a) from the date

of the warrant's issuance until the occurrence of the triggering event and (b) from the occurrence of the triggering event until ten days after the warrant's issuance (see App., *infra*, 47a),[3] the appropriate remedy is to sever the portion of the warrant that authorized a search before the triggering event. And since no search occurred before the triggering event, no evidence was improperly obtained and suppression is not required.

The situation is analogous to one in which a traditional (*i.e.*, non-anticipatory) warrant authorizes the search of two apartments in a building (A and B) even though probable cause was shown only as to apartment B. If the officers in such a case searched both apartments, the remedy would be to sever the warrant insofar as it authorized a search of apartment A and to suppress the evidence obtained from apartment A. There would be no justification for suppressing the evidence obtained from apartment B. See, *e.g.*, *United States* v. *Pitts*, 173 F.3d 677, 679-681 (8th Cir. 1999) (where warrant authorized search of "713-715 East Lake Street," evidence seized from 715 East Lake Street was admissible "even if police lacked probable cause to search 713 East Lake Street," because "police clearly possessed probable cause to search" 715 East Lake Street). If, instead, the officers in such a case searched only apartment B, no suppression of any evidence would be required, because the only apartment that was searched was the one as to which there was a showing of probable cause. The same is true in a case,

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[3] Rule 41 of the Federal Rules of Criminal Procedure requires that a search warrant "command the officer" to "execute the warrant within a specified time no longer than 10 days." Fed. R. Crim. P. 41(e)(2)(A). The warrant in this case conformed to Rule 41. See App., *infra*, 47a.

like this one, where the anticipatory warrant, on its face, authorized a search at any time between the warrant's issuance and ten days thereafter, there was probable cause to search only after the triggering event occurred, and the search did not take place until after that occurrence.

B. The Ninth Circuit's Decision Conflicts With Decisions Of Five Other Circuits

1. The Ninth Circuit requires suppression when the triggering event for an anticipatory search warrant is not described either in the warrant itself or in a supporting affidavit that is both incorporated into the warrant and left with the person whose property is being searched. That rule has been rejected by the Second, Sixth, Seventh, Eighth, and Tenth Circuits.

In *United States* v. *Rey*, 923 F.2d 1217 (1991), the Sixth Circuit affirmed the denial of a motion to suppress where "the affidavit requested a warrant for a search 'subsequent to the delivery of the package tomorrow,'" but the warrant itself "did not specify that the search could only be executed after the controlled delivery had been made." *Id.* at 1221. The court observed that "the warrant would have been void" if "the controlled delivery had not occurred," but held that "the warrant's silence" with respect to the triggering condition "does *not* render it void," even if "it may [have] be[en] preferable" to include the condition in the warrant. *Ibid.* (emphasis added).

In *United States* v. *Tagbering*, 985 F.2d 946 (1993), the Eighth Circuit followed the Sixth Circuit. *Tagbering* rejected, on two alternative grounds, the argument that "the warrant was invalid because it did not expressly condition the search upon the controlled delivery." *Id.* at 950. The court held that "the search

warrant, fairly construed, did contain this condition," and that, even if it did not, the Constitution does not "require[] that th[e] limitation be written into the warrant itself." *Ibid.* Citing *Rey*, the Eighth Circuit observed that suppression would have been appropriate only if "the warrant [had been] executed before the controlled delivery occur[red]." *Ibid.*

In *United States* v. *Moetamedi*, 46 F.3d 225 (1995), the Second Circuit followed the Eighth Circuit. "[A]dopt[ing] the reasoning of *Tagbering*," the court held that "an anticipatory warrant is valid even though it does not state on its face the conditions precedent for its execution." *Id.* at 229. Even if "the most efficient way to ensure than an anticipatory warrant is properly executed is to include the conditions for its execution in the warrant," the court said, there is no "Fourth Amendment violation requiring suppression" when "(1) 'clear, explicit, and narrowly drawn' conditions for the execution of the warrant are contained in the affidavit" and "(2) those conditions are actually satisfied before the warrant is executed." *Ibid.* (quoting *United States* v. *Garcia*, 882 F.2d 699, 703-704 (2d Cir.), cert. denied, 493 U.S. 943 (1989)).

In *United States* v. *Hugoboom*, 112 F.3d 1081 (1997), the Tenth Circuit followed the Second Circuit. In that case, the triggering condition was described in the affidavit but not the warrant, and the Tenth Circuit rejected the argument that "such omission is constitutional error." *Id.* at 1087. Quoting *Moetamedi*, the court said that the Fourth Amendment is satisfied when the triggering event is "stated in the affidavit that solicits the warrant, accepted by the issuing magistrate, and actually satisfied in the execution of the warrant." *Ibid.* (quoting 46 F.3d at 229).

In *United States* v. *Dennis*, 115 F.3d 524 (1997), the Seventh Circuit followed the Second Circuit as well. The court held that "the anticipatory warrant was valid even though it did not list the conditions precedent to execution on its face or append a copy of the supporting affidavit." *Id.* at 529. Like the Second Circuit in *Moetamedi*, the Seventh Circuit found no Fourth Amendment violation because the affidavit "contained satisfactory conditions," the magistrate judge "read and considered the affidavit in issuing the warrant," and "the officers complied with the conditions precedent in executing the warrant." *Ibid.*

The conflict between the Ninth Circuit, on the one hand, and the Second, Sixth, Seventh, Eighth, and Tenth Circuits, on the other, was acknowledged both in *Hotal* (the Ninth Circuit decision on which the court of appeals relied here) and in a subsequent decision of the Tenth Circuit. In *Hotal*, the Ninth Circuit observed that "[o]ther circuits have directly addressed" the question whether "an anticipatory search warrant lacks sufficient particularity when it does not identify the event on which the execution of the warrant is conditioned." 143 F.3d at 1226. Citing the decisions discussed above, the court went on to say that the Second, Sixth, Seventh, Eighth, and Tenth Circuits have all held—contrary to the Ninth Circuit's conclusion in *Hotal*—that an anticipatory warrant's failure "to state on its face the conditions necessary for its execution" does not "constitute a Fourth Amendment violation." *Ibid.* Several years later, in *United States* v. *Hernandez-Rodriguez*, 352 F.3d 1325 (2003), the Tenth Circuit rejected "the rule of the Ninth Circuit," announced in *Hotal*, that "the condition for anticipatory warrants must be set forth on the face of the warrant." *Id.* at 1332. The court explained that adoption of that

rule "is precluded by" its decision in *Hugoboom*, which, the court added, "is in accord with" the decisions of the Second, Sixth, Seventh, and Eighth Circuits discussed above. *Id.* at 1332-1333.

2. In adopting, in *Hotal*, the rule at issue here, the Ninth Circuit (143 F.3d at 1226-1227) purported to follow two decisions of the First Circuit: *United States* v. *Ricciardelli*, 998 F.2d 8 (1993), and *United States* v. *Gendron*, 18 F.3d 955 (Breyer, J.), cert. denied, 513 U.S. 1051 (1994). While it is possible to read those decisions as requiring that the triggering event be described in an anticipatory search warrant, the First Circuit cases involved a different issue.

In *Ricciardelli*, the triggering event *was* described in the warrant, which authorized a search of the defendant's home after a package containing child pornography was received by the defendant (not after it was received at his home). 998 F.2d at 9. The warrant was executed after the defendant picked up the package at a post office and brought it home. *Id.* at 10. The court suppressed the evidence because there was not a sufficient connection between the triggering event and the place to be searched. *Id.* at 12-14. In particular, the court held that "the event that triggers the search must be the delivery of the contraband *to the premises to be searched.*" *Id.* at 13. The court relied on the principle that contraband must be "on a sure and irreversible course to its destination"—a principle, the court said, that ensures that the contraband "will almost certainly be located there at the time of the search, thus fulfilling the requirement of future probable cause." *Id.* at 12-13. The court also said that "it is the triggering condition of [the defendant's] receipt of the videotape at home" that eliminates the possibility that he was "a runner for some other person, or simply an internuncio," thereby

"producing probable cause to believe that [he] is a collector of child pornography and, hence, that his residence likely contains evidence of his criminality." *Id.* at 14.

Ricciardelli therefore can be viewed as resting, not on the Fourth Amendment's particularity requirement, but on its requirement of probable cause. It is not clear from the opinion whether a more specific triggering condition, tied to the defendant's receipt of the contraband at his home, was set forth in the supporting affidavit. And even if such a condition was set forth in the affidavit, the search, in fact, did not take place after the defendant received the package at his home. Accordingly, *Ricciardelli* does not rule out the possibility that suppression would not be required if a proper triggering event were set forth in the affidavit and the search occurred after the triggering event.

In *Gendron*, too, the triggering event, which was "virtually identical" to the one at issue in *Ricciardelli*, 18 F.3d at 966, was described in the warrant itself. *Id.* at 965. Unlike the defendant in *Ricciardelli*, however, the defendant in *Gendron* apparently received the contraband at his home. *Id.* at 967. And contrary to its conclusion in *Ricciardelli*, the court in *Gendron* held that suppression was not appropriate, *id.* at 964-967, because the triggering event was described with "sufficient clarity," *id.* at 965. Since the warrant itself in *Gendron* described the triggering event and the court held the description adequate, the First Circuit did not consider the question whether suppression would be required if the triggering condition was adequately described only in the supporting affidavit. Like *Ricciardelli*, therefore, *Gendron* is not inconsistent with the decisions of the Second, Sixth, Seventh, Eighth, and Tenth Circuits discussed above, and it does

not contribute to the conflict in authority. In any event, neither *Gendron* nor *Ricciardelli* provides a valid rationale for suppression when the triggering event was adequately described in the affidavit and the search occurred after the triggering event.

C. The Ninth Circuit's Decision Involves An Issue Of Recurring Importance To The Administration Of The Criminal Justice System

In the Ninth Circuit, searches pursuant to an anticipatory search warrant are illegal, and evidence must be suppressed, in any case in which the triggering event is not described either in the warrant itself or in a supporting affidavit that is both incorporated into the warrant and left with the person whose property is being searched. As a consequence of that rule, there are cases where the government must proceed to trial without the most probative evidence of the defendant's guilt, agree to a guilty plea on terms highly favorable to the defendant, or forgo prosecution altogether. Indeed, if the court of appeals' decision in this case stands, the charges against respondent may have to be dismissed, since the court determined that both the videotape and respondent's statements must be suppressed. Because anticipatory search warrants are routinely used by law enforcement officers in connection with the controlled delivery of drugs, child pornography, and other contraband, and because approximately 23% of federal criminal cases are brought in the Ninth Circuit, see Administrative Office of the U.S. Courts, *2004 Annual Report of the Director: Judicial Business of the United States Courts* 181-183 (Table D. Cases), the rule at issue has a significant effect on the administration of the criminal justice system.

As then Chief Judge Breyer observed in *Gendron*, anticipatory warrants may offer "greater, not lesser, protection against unreasonable invasion of a citizen's privacy," because the likely alternative to their use is that law enforcement officers would "simply conduct the search (justified by 'exigent circumstances') without any warrant at all." 18 F.3d at 965. Insofar as it creates an incentive to avoid the use of anticipatory warrants, therefore, the Ninth Circuit's rule would ultimately disserve the privacy interests of citizens as well as the law enforcement interests of the government.

It is true that investigators and prosecutors in the Ninth Circuit can avoid suppression by ensuring that the triggering event is described in the warrant—or, if it is not, by ensuring that the supporting affidavit is both incorporated into the warrant and left with the person whose property is being searched. Even if federal investigators and prosecutors in the Ninth Circuit could be trained to take those steps, however, there would still be cases in which the Ninth Circuit's rule would undermine federal prosecutions. That is true for at least two reasons.

First, prosecutions in federal court, including those involving drugs and child pornography, often result from investigations conducted at the state or local level. In many cases, therefore, the evidence on which federal prosecutors rely is the result of an anticipatory warrant obtained, and a search conducted, by state or local law enforcement officers. While it may be possible, through training, to minimize the instances in which *federal* anticipatory search warrants omit the triggering event, and in which *federal* officers executing anticipatory warrants do not leave an incorporated affidavit at the search location, there is no practical way for the federal

government to ensure that every law enforcement agency and prosecutor's office in every state and locality within the Ninth Circuit adheres to that court's rule. That is especially true given that state trial and appellate courts are not bound by decisions of the Ninth Circuit. See *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 58 n.11 (1997); *Lockhart* v. *Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring).

Second, the nature of criminal investigations is such that search warrants must often be prepared in haste. As a consequence, even information that is indisputably required by the Fourth Amendment is sometimes omitted from warrants through inadvertence. See, *e.g.*, *Groh* v. *Ramirez*, 540 U.S. at 567 (Kennedy, J., dissenting) (items to be seized). Because obtaining and executing a search warrant is a complex enough undertaking as it is, the government has a substantial interest in avoiding the need to satisfy unjustified requirements whose violation is punishable by suppression. The Warrant Clause itself strikes the proper balance, and prosecutions should not be undermined by a failure to comply assiduously with additional judge-made rules.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2005

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 03-10311

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JEFFREY GRUBBS, DEFENDANT-APPELLANT

Filed: July 26, 2004
Amended: Dec. 6, 2004

Before: B. FLETCHER, REINHARDT, Circuit Judges, and RESTANI, Chief Judge.*

ORDER

The majority opinion filed July 26, 2004, slip op. 9965, and appearing at 377 F.3d 1072 (9th Cir.2004), is hereby amended as follows:

1. Last line on slip op. 9976 [377 F.3d at 1077] and continuing onto slip op. 9977 [377 F.3d at 1077]: after "(a)," replace "is incorporated within the four corners of the warrant" with "is sufficiently incorporated into the warrant."

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* The Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

With this amendment, the panel has voted to deny the petition for panel rehearing. Judge Reinhardt has voted to deny the petition for rehearing en banc, and Judge B. Fletcher and Judge Restani so recommended. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED. No further petitions for rehearing or petitions for rehearing en banc shall be entertained.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 03-10311

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JEFFREY GRUBBS, DEFENDANT-APPELLANT

Filed: July 26, 2004

OPINION

Before: B. FLETCHER, REINHARDT, Circuit Judges, and RESTANI, Chief Judge.*

REINHARDT, Circuit Judge:

Jeffrey Grubbs appeals following his conditional guilty plea on a charge of receiving a visual depiction of a minor engaged in sexually explicit conduct. 18 U.S.C. § 2252(a)(2). He contends that the district court should have granted his motion to suppress evidence, including his statements, because the anticipatory search warrant that authorized the search of his premises was invalid under the Fourth Amendment. To resolve Grubbs' claim, we must determine whether a facially

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* The Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation

defective anticipatory search warrant may be cured by information contained within an affidavit when that affidavit is not presented to the person or persons whose property is to be searched. We answer that question in the negative, and hold that the search of Grubbs' premises violated the Fourth Amendment.[1]

I. FACTUAL AND PROCEDURAL HISTORY

On April 17, 2002, United States Postal Inspector Gary Welsh ("Welsh") presented an "Application and Affidavit for Anticipatory Search Warrant" to a federal magistrate judge. The application sought authority to conduct a search of Grubbs' residence on the basis of an order Grubbs allegedly placed for a videotape entitled "Lolita Mother and Daughter." Grubbs allegedly ordered the videotape from a website that advertised for sale numerous videos depicting illegal child pornography. Welsh averred that Grubbs sent him a letter which contained $45 in cash and a note stating: "I hope this makes it to you please send film asap thanks Jeff Grubbs." On the basis of this evidence, the magistrate judge issued an anticipatory search warrant. The face of the warrant stated:

> Affidavit(s) having been made before me by _____ who has reason to believe that on the premises known as residence of Jeffrey Grubbs, [Address] as more particularly described in Attachment A to the attached Affidavit, in the Eastern District of California there is now concealed a certain person or property, namely the records and materials described in Attachment B to the attached Affidavit. I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

[1] Grubbs also claims that the statement he gave to officers at the beginning of the search was obtained in violation of *Miranda*, and that the officers violated Fed. R. Crim. P. 41(d) by failing to show him the warrant at the outset of the search. Our resolution of the principal question in this case makes it unnecessary to resolve these other issues.

As revealed by the "now concealed" language, the inartfully drafted warrant approved by the magistrate was written on a form "forthwith" search warrant.[2] The only indication that the warrant was an anticipatory search warrant was the word "ANTICIPATORY," handwritten at the top of the page above the words "SEARCH WARRANT." The warrant itself did not state what triggering conditions needed to occur in order to make the warrant valid; nor did it state the criminal activity of which Grubbs was suspected.

The warrant relied on a 25-page affidavit to satisfy the specificity and particularity requirements of the Fourth Amendment. According to the affidavit, the warrant would become operative once the videotape Grubbs ordered was "received by a person(s)" and "taken into the residence." Pages five and nineteen of the affidavit set forth these "triggering events," or conditions precedent, upon which a search would become authorized. The affidavit also had two attachments: Attachment A described the premises to be searched; Attachment B listed the items to be seized, including

[2] It is clear that, at the time the warrant was approved, no records or materials were "now concealed" at Grubbs' residence.

the videotape and packing material, Grubbs' Web TV components, and various other items.

The search took place two days later. At approximately 7:20 A.M., an undercover postal inspector delivered the videotape to Grubbs' residence. Grubbs' wife accepted the delivery of the package, signed for it, and took it into the house. A few minutes later, Postal Inspector Thomas Brucklacher saw Grubbs leaving. At approximately 7:24 A.M., Brucklacher and Inspector Esteban approached Grubbs and, after identifying themselves, told him to remain where he was standing. Grubbs asked Brucklacher why he and the other inspectors were there. Brucklacher did not answer, but instead referred him to Inspector Welsh, who was then approaching the residence. Meanwhile, Inspector Esteban performed a patdown search of Grubbs.

Shortly after Grubbs was detained outside of the house, Inspector Welsh arrived at the premises with a number of other law enforcement personnel. In all, there were ultimately ten officers and inspectors at the scene. Welsh allegedly announced "Police/Search Warrant" at the front door. Grubbs' wife, Ms. Bradstreet, disputed hearing that announcement, but did testify that she heard a knock and answered the door. Welsh briefly entered the house to help several other officers perform a "protective sweep." During that "protective sweep," the officers searched the house for other people and stopped to prepare sketches of the interior. They permitted Grubbs' children to leave for school after searching their backpacks. After assisting the officers inside, Welsh went back outside to speak with Grubbs, who was on the sidewalk with other officers. Welsh identified himself, and stated either "You know why

we're here" or "Do you know why we're here?"[3] Grubbs replied "yeah," and said that what the officers were looking for was in the garage. Welsh told Grubbs that he was not under arrest, but that they were there to serve a search warrant, and that they should go inside the house to talk.[4]

Grubbs and Welsh, accompanied by Officer Esteban, entered the house together and sat down at the dining room table. It was not until 7:53 A.M., approximately 30 minutes after the search began, that Welsh presented Grubbs with the search warrant.[5] The copy of

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[3] The record does not establish with certainty whether Welsh asked this as a question or stated it as a matter of fact. Welsh testified that he phrased the words as a statement because "I didn't want to ask any questions prior to *Miranda*." The district court found that it was phrased in the form of a statement, rather than a question. Ultimately, we find it inconsequential whether Welsh spoke the words in the form of a question or a statement, as we decline to reach the *Miranda* issue.

[4] The district court did not make an explicit factual finding as to the sequence of events as described in this paragraph. However, to the extent that the district court's decision suggests that the "protective sweep" did not begin until after Welsh had spoken with Grubbs, it is clearly erroneous. Welsh's declaration itself admits that he announced "police/search warrant" at the front door, entered the house with the search team to begin a protective sweep, and only then returned outside to speak with Grubbs.

[5] At the evidentiary hearing in the district court, Welsh explained this 30 minute delay as follows:

> Well, we had to get in, we talked to his wife, explained to his wife why we were there. I made sure the kids got off to school on time. We checked their backpacks, of course, as per procedures and to make sure nothing was leaving the house. We took care of that. We went in, photographs were taken of the house, sketches, hand drawn sketches of the house had to be made. It took a while to clear things away from the table.

the search warrant provided to Grubbs included the two attachments, which described the place to be searched and the items to be seized, but did not include the affidavit that contained the "triggering events" or conditions precedent that would serve to make the warrant operative. Welsh contended that he had a copy of the affidavit with him at all times during the search, and that his team had all read the affidavit on the previous evening. However, the government concedes that the affidavit was not presented to Mr. Grubbs or Ms. Bradstreet, and that no copy of the affidavit was left at the residence following the search.

After the warrant was presented, Welsh reminded Grubbs that he was not under arrest, advised him of his *Miranda* rights, and asked if he understood those rights. Grubbs said that he did and agreed to speak to Welsh. The interview lasted approximately 55 minutes. In it, Grubbs admitted that he had ordered the pornography. He further admitted that he possessed child pornography in various digital forms in his home. At the conclusion of the interview, Grubbs was arrested and handcuffed. The officers seized the videotape in question along with several other items, including Grubbs' computer and several computer diskettes.[6]

Within a few days, a grand jury returned an indictment charging Grubbs with receiving a visual depiction of a minor engaged in sexually explicit conduct. 18

We also had to deal with the fact that narcotics paraphernalia were found on the defendant plus on the table that we were about to do the interview on. So all told, I think all those preliminaries took about 30 minutes.

[6] The actual list of evidence seized is unimportant in this case, as the government has stipulated that the only physical evidence it intended to introduce at trial was the videotape.

U.S.C. § 2252(a)(2).[7] Grubbs filed a motion to suppress evidence, in which he challenged the admissibility of all of the seized evidence and his statements to Welsh. Grubbs made three principal claims: (1) that the agents' failure to present the affidavit to Grubbs or his wife rendered the warrant inoperative; (2) that the agents violated Fed. R. Crim. P. 41(d) by failing to present the search warrant at the outset of the search; and (3) that his statement that the video was in the garage should be excluded as the product of an impermissible custodial interrogation. The first and third claims alleged constitutional violations.

Following an evidentiary hearing, the district court denied the motion to suppress in a written order. With respect to Grubbs' first claim, the Fourth Amendment claim, the district court held that the anticipatory warrant could constitutionally be executed even though it failed to designate the triggering event for the implementation of the anticipatory search. It did so on the basis that the warrant incorporated the affidavit by reference, and that the affidavit was in the immediate presence of the officers while they searched Grubbs' residence. The court did not consider the officers' failure to present the affidavit to the residents of the home to be searched as constituting a constitutional defect. The district judge admitted that "it is logical that officers would be required to actually present the

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[7] That section makes illegal the knowing receipt or distribution of "any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or . . . any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer." *Id.*

affidavit setting forth the triggering event to the people whose property they are searching in order to provide those people with information regarding the parameters of the search." However, after concluding that no case from our circuit had ruled on the precise question, the court declined to apply that logic "in the absence of specific guidance from the Ninth Circuit."[8] Thus, it upheld the search, even though none of the persons whose residence was searched were shown the affidavit that identified the triggering event.

After filing a motion for reconsideration, which the district court denied, Grubbs entered a conditional guilty plea to the sole charge of the indictment—receiving a visual depiction of a minor engaged in sexually explicit conduct. He reserved his right to appeal the denial of his motion to suppress. The district court sentenced him to thirty-three months imprisonment, a three-year term of supervised release, a fine of $3,700, and a $100 special assessment. Grubbs timely appealed.

II. DISCUSSION

The Fourth Amendment states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The requirement that warrants "particularly describ[e] the place to be searched, and the persons or things to be seized" is most often described as the "particularity requirement." As the Supreme Court has recently explained, that requirement "applies with equal force to searches whose only defect is a lack of particularity in the warrant." *Groh v.*

[8] For reasons we need not discuss here, the district court denied Grubbs' Rule 41(d) and *Miranda* claims as well.

Ramirez, 540 U.S. 551, ——, 124 S. Ct. 1284, 1291, 157 L. Ed. 2d 1068 (2004).

The *Groh* Court considered a warrant that "failed to identify any of the items" to be seized. 540 U.S. at ——, 124 S. Ct. at 1288. Despite the fact that the officers conducting the search had presented to the reviewing magistrate a detailed affidavit setting forth sufficient probable cause for the search, the warrant itself did not explicitly "incorporate by reference the itemized list [of things to be seized] contained in the application." *Id.* The officers in *Groh* left the residents of the searched home a copy of the search warrant, "but not a copy of the application, which had been sealed." *Id.* at 1289. The Court found that the officers' conduct directly conflicted with the purpose of the Fourth Amendment's particularity requirement:

> The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents. And for good reason: "The presence of a search warrant serves a high function," and that high function is not necessarily vindicated when some other document, somewhere, says something about the objects of the search, but the contents of that document are neither known to the person whose home is being searched nor available for her inspection. . . .
>
> . . . .
>
> We have long held, moreover, that the purpose of the particularity requirement is not limited to the prevention of general searches. A particular warrant also "assures the individual whose property is searched or seized of the lawful authority of the

executing officer, his need to search, and the limits of his power to search."

Groh, 540 U.S. at —— - ——, ——, 124 S. Ct. at 1289-90, 1292 (citations omitted).

Our cases have long been in accord with the Supreme Court's reasoning in *Groh*. We have held that a search warrant is invalid when it does not contain a specific description of the types of items to be seized. *See, e.g., United States v. Spilotro*, 800 F.2d 959, 963-64 (9th Cir. 1986). And, while we have permitted facially defective warrants to be "cured" by an affidavit that (a) is incorporated within the four corners of the warrant and (b) "accompanies" the warrant, *see United States v. Van Damme*, 48 F.3d 461, 466 (9th Cir. 1995), we have unequivocally held that the defect is not cured if the officers fail to present the affidavit—that is, an affidavit that is not shown to the persons being subjected to the search does not have a curative effect on a facially defective warrant. *See United States v. McGrew*, 122 F.3d 847, 849-50 (9th Cir. 1997).

As we explained in *McGrew*, we require affidavits to accompany warrants not only in order to limit officers' discretion in conducting the search, but also in order to "*inform the person subject to the search what items the officers executing the warrant can seize.*" *Id.* at 850 (quoting *United States v. Hayes*, 794 F.2d 1348, 1355 (9th Cir. 1986)) (emphasis in *McGrew*). If the officers conducting the search were not required to present the affidavit to the residents of the house being searched, law enforcement personnel would be free to search as they like, and homeowners and others would have no effective way to ensure that the search of their premises conformed to the lawful constraints approved by an impartial magistrate. *See id.* at 850; *see also Ramirez v. Butte-Silver Bow Cty.*, 298 F.3d 1022, 1026 (9th Cir. 2002) ("When officers fail to attach the affidavit to a general warrant, the search is rendered illegal because the warrant neither limits their discretion nor gives the homeowner the required information."), *aff'd Groh*, 540 U.S. at ——, 124 S. Ct. at 1295; *Ramirez*, 298 F.3d at 1027 ("To stand a real chance of policing the officers' conduct, individuals must be able to read and point to the language of a proper warrant.").

Our cases have similarly held, without exception, that the particularity requirement of the Fourth Amendment applies with full force to the conditions precedent to an anticipatory search warrant. An anticipatory search warrant is not valid until the occurrence of one or more "triggering events"—in other words, the predicted future events that the magistrate determines will create sufficient probable cause to justify the search. And, "when a warrant's execution is dependent on the occurrence of one or more conditions, the warrant itself must state the conditions precedent to its execution and these conditions must be clear, explicit, and narrow." *United States v. Hotal*, 143 F.3d 1223, 1226 (9th Cir. 1998). The rationale for this rule is simple: "a warrant conditioned on a future event presents a potential for abuse above and beyond that which exists in more traditional settings: inevitably, the executing agents are called upon to determine when and where the triggering event specified in the warrant has actually occurred." *Id.* at 1226 (quoting *United States v. Ricciardelli*, 998 F.2d 8, 12 (1st Cir. 1993)). Application of the particularity requirement is "the only way effectively to safeguard against unreasonable and unbounded searches." *Id.* at 1227.

We have, however, permitted the triggering conditions of an anticipatory search warrant to appear either on the face of the warrant itself, or in the "attachments[to the warrant] that those executing the search maintain in their immediate possession in order to guide their actions and *to provide information to the person whose property is being searched.*" *Id.* (emphasis added); *see also United States v. Vesikuru*, 314 F.3d 1116, 1120 (9th Cir. 2002) ("It is important to emphasize that we have not held that the condition precedent must be stated within the four corners of the warrant itself."). Still, while an affidavit may qualify as a valid curing "attachment" to an otherwise defective warrant, it counts as such only when the affidavit actually "accompanies" the warrant. As we explained in *Hotal*,

> The first requirement, that the application but *not* the warrant itself identify the triggering event, does little if anything to limit the discretion of the agents executing the warrant or *to inform the subject of the search whether it was authorized*, if the affidavit does not accompany the warrant. Indeed, that the applicant and the magistrate may understand the parameters of the search has no bearing on whether the officers executing the warrant do, or *whether the person to be searched is properly advised of their authority*.

Hotal, 143 F.3d at 1227 (emphasis added).

The question in this case is whether a curative affidavit that contains the conditions precedent to an anticipatory search actually "accompanies" the warrant when the affidavit is not shown to the person or persons being subjected to the search. Given our prior holdings, and the Court's most recent decision in *Groh*, the district court was correct when it opined that "it is logical that officers would be required to actually present the affidavit setting forth the triggering event to the people whose property they are searching in order to provide those people with information regarding the parameters of the search." Likewise, the district court was right to conclude that the "underlying reasoning" of *Hotal* supports the rule that "the affidavit setting forth the triggering event for an anticipatory warrant must be presented to the people whose property is being searched." The district court, however, was unwilling to impose such a requirement in this case without further explicit guidance from us.

We believe that our prior cases unambiguously require officers to present any curative document—be it an affidavit, attachment, or other instrument that supplies the particularity and specificity demanded by the Fourth Amendment—to the persons whose property is to be subjected to the search. To the extent that there is any question that our cases have adopted that rule, we do so explicitly now. Anticipatory search warrants are invalid absent "clear, explicit, and narrow" triggering conditions. *See Hotal*, 143 F.3d at 1226. Those triggering conditions may be listed either in the warrant itself or in attached documents, but whatever document contains them must be presented to the person whose property is being searched. Absent such presentation, individuals would "stand [no] real chance of policing the officers' conduct," because they would have no opportunity to check whether the triggering events by which the impartial magistrate has limited the officers' discretion have actually occurred. *See Ramirez*, 298 F.3d at 1027. In short, unless the officers "present" the document containing the triggering

events necessary to render an anticipatory search warrant operative, the search warrant is constitutionally invalid. In the absence of a proper presentation, "the search is rendered illegal because the warrant neither limits [the officers'] discretion nor gives the homeowner the required information." *Id.* at 1026.

In this case, there is no dispute that the officers failed to present the affidavit—the only document in which the triggering conditions were listed—to Grubbs or Bradstreet. At no point before, during, or after the search did the officers show or read the affidavit to either of them. The copy of the warrant left with Ms. Bradstreet at the conclusion of the search did not include the affidavit, nor did it otherwise include a list of the triggering conditions. The warrant was therefore inoperative, and the search was illegal.[9]

Absent a constitutionally valid warrant, the officers lacked the legal authority to enter the defendant's home. The fact that the search ultimately may have been conducted in a manner consistent with the application for the warrant is irrelevant. "If a warrant fails for lack of particularity or specificity, it is simply unconstitutional—without regard to what actually occurred." *Hotal*, 143 F.3d at 1227. Nor is it significant that the officers may have possessed curative documents during the search, unless those documents were presented to the owners or occupants of the property: "that the

[9] We need not decide whether the warrant and curative material must be shown to the persons whose property is being searched *prior* to the officers' entry into the home. We do note, however, that "absent exigent circumstances, if a person is present at the search of her premises, Rule 41(d) requires officers to give her a complete copy of the warrant at the outset of the search." *United States v. Gantt*, 194 F.3d 987, 994 (9th Cir. 1999).

applicant and the magistrate may understand the parameters of the search has no bearing on whether . . . the person to be searched is properly advised of [the officers'] authority." *Id.* at 1227. We therefore conclude that the officers in this case did not execute a constitutionally valid warrant, and that they, in effect, conducted a warrantless search. *See id.* at 1228 & n.7. As a result, *all* evidence obtained during that search, and following Welsh's announcement of "Police/Search Warrant," must be suppressed. *See id.* at 1228 ("Because we conclude that the initial entry was impermissible and that the evidence seized pursuant to the warrant must be suppressed, *all* of the other evidence seized must also be suppressed. Consent to search that is given after an illegal entry is tainted and invalid under the Fourth Amendment."). "All evidence" includes all of the evidence seized after the initial entry, as well as all of Grubbs' statements, all of which were taken either during the illegal entry or as a direct causal result of it. *See United States v. Crawford*, 372 F.3d 1048, at 1053-54, 2004 WL 1375521, at * 4 (9th Cir. June 21, 2004) (en banc) (holding that the Fourth Amendment's exclusionary rule "applies to statements and evidence obtained as a product of illegal searches and seizures" whenever there is a "causal connection between the illegal conduct and the evidence sought to be suppressed"); *see also Wong Sun v. United States*, 371 U.S. 471, 485, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) ("Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion.").[10]

[10] It might be argued that because the officers had probable

cause to perform the search and arrest Grubbs in the first instance, the statements Grubbs made to the officers were admissible. *See United States v. Ladum*, 141 F.3d 1328, 1337 (9th Cir. 1998) (en banc). This argument fails for three reasons. First, the government did not make this argument, either in its briefs or at oral argument, despite the fact that Grubbs had argued from the start that suppression of all evidence and statements would be required in the event that we found a Fourth Amendment violation. The argument is therefore waived. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).

Second, statements that are taken from a homeowner in the course of an illegal search of his home must be suppressed. *See New York v. Harris*, 495 U.S. 14, 20-21, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990). All of Grubbs' statements were made during the course of the unconstitutional search. Inspector Welsh's declaration establishes that he announced "Police/Search Warrant" at the door prior to the time the officers entered to conduct their "protective sweep" and prior to the time Grubbs made his statement regarding the location of the video. *See supra* note 4. No evidence had been obtained or noticed in plain view at that point. Under *Hotal*, all evidence seized after Welsh's "search warrant" announcement at the door must be suppressed, 143 F.3d at 1228, and, under *Harris*, this includes all statements made during the course of the search, 495 U.S. at 20-21, 110 S. Ct. 1640.

Third, application of the exclusionary rule depends on the facts of each case. *Brown v. Illinois*, 422 U.S. 590, 603, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975). In this case, the fruits (Grubbs' statements) are "directly or indirectly attributable to the constitutional violation," *Crawford*, 372 F.3d 1048, 2004 WL 1375521, at *8, and thus the pertinent causal connection exists. The illegality was the officers' failure to present to Grubbs information that would have informed him about the reasons for the search such that he could have challenged the entry if he so desired. *See Ramirez*, 298 F.3d at 1026-27, *aff'd Groh*, 540 U.S. at ——, 124 S. Ct. at 1295. Inspector Welsh's declaration "You know why we're here" presumed that Grubbs knew the very information that the affidavit was supposed to provide. Were we to validate this type of investigative technique, we would be encouraging officers to evade the particularity requirement of the Fourth Amendment by obtaining potentially incriminating statements of understanding from search subjects. Therefore, not only is the "challenged evidence [ ] in some sense the product of illegal governmental activity," *see Ladum*, 141 F.3d at 1337 (quoting *Harris*, 495 U.S. at 19, 110 S. Ct. 1640), but application of the exclusionary rule "serve[s] the purpose of the rule that made [the search] illegal." *Harris*, 495 U.S. at 20, 110 S. Ct. 1640.

III. CONCLUSION

The failure to present the affidavit designating the triggering events or conditions precedent to the operability of the search warrant rendered the warrant constitutionally invalid and the search illegal. Because Grubbs entered a conditional guilty plea, we are required to remand and allow him to withdraw his plea if he elects to do so. *See United States v. Mejia*, 69 F.3d 309, 316 n.8 (9th Cir. 1995). We therefore reverse the denial of Grubbs' suppression motion and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CR. S-02-164 WBS

UNITED STATES OF AMERICA, PLAINTIFF

v.

JEFFREY GRUBBS, DEFENDANT

Filed: Feb. 14, 2003

MEMORANDUM AND ORDER RE: MOTION FOR RECONSIDERATION

This matter came on for hearing on the motion of defendant Jeffrey Grubbs to suppress evidence obtained as the result of a search of his residence on April 19, 2002 and to suppress statements made by defendant to officers on April 19, 2002. The court herd testimony, received and considered documentary evidence, and heard the arguments of counsel. The court denied defendant's motion to suppress. (Jan. 16, 2003 Order).[1] Defendant now moves for reconsideration on the grounds that the court made errors of law in denying his motion to suppress.

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[1] The court will not recite the facts of this case here. The court's findings of fact are available in its January 16, 2003 Order.

I. *Legal Standard*

Pursuant to Local Criminal Rule 12-430, whenever a motion for reconsideration of a decision on a prior motion is made, it is counsel's duty to present to the judge "what new or different facts or circumstances are claimed to exist which did not exist or were not shown upon such prior motion or what other grounds exist for the motion." E.D. Cal. Local Rule 12-430(3).

II. *Anticipatory Search Warrant*

A. *Validity of Warrant*

According to defendant, the Ninth Circuit's recent decision in *United States v. Vesikuru*, 314 F.3d 1116 (9th Cir. 2002), requires this court to reconsider its holding that the warrant in this case was valid. In *Vesikuru*, the Ninth Circuit reiterated a well-settled principle on which this court based its holding in denying defendant's motion to suppress—namely that in the anticipatory warrant context, "[t]he Fourth Amendment's particularity requirement is satisfied if (1) an affidavit setting forth the triggering event for the search accompanies the warrant at the time of the search, and (2) the warrant sufficiently incorporates that accompanying affidavit." *Vesikuru*, 314 F.3d at 1120. The court then relied on these requirements to hold that the warrant was facially valid because it incorporated the supporting affidavit and because the affidavit accompanied the warrant at the search. *Id.* at 1121-22.

Defendant reads *Vesikuru* as requiring the affidavit to contain the triggering event on its face and therefore argues that the warrant in this case was invalid because the "triggering event is buried deep within the warrant affidavit and not clearly and expressly set forth on its

face."[2] In a string cite, the *Vesikuru* court did refer to language from *United States v. Hotal*, 143 F.3d 1223 (9th Cir. 1998), stating that the triggering event for an anticipatory search warrant must appear on the face of the warrant or on the face of the accompanying affidavit. *See Vesikuru*, 314 F.3d at 1120. However, the Ninth Circuit's discussion in *Vesikuru* focused on what constitutes sufficient words of incorporation, and not, as defendant erroneously contends, on the language from *Hotal* stating that the triggering event must be on the face of the affidavit. *See id.* at 1120-21.

Neither *Vesikuru* nor *Hotal* provide any further guidance as to what it means for the triggering event to be "on the face" of the affidavit. The *Vesikuru* court found the affidavit to be sufficient based on the principles discussed above and did not indicate which specific portion of the affidavit set forth the triggering event. *Id.* at 1118, 1120-22. The *Hotal* court found the warrant to be invalid because it did not mention the triggering event on its face and because there was no evidence that the affidavit accompanied the warrant at the time of the search. *Hotal*, 143 F.3d at 1225, 1227.

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[2] Defendant argues that the triggering event does not appear in the affidavit until paragraphs 57 through 61. However, the triggering event—the controlled delivery of the video tape—is first set forth at paragraph fourteen of the affidavit. It is discussed in the context of Inspector Welsh's statements regarding his training and the reason for the affidavit. Therefore, contrary to defendant's assertion, it does not appear to be "buried deep" within the affidavit. In defendant's briefs on his motion to suppress, he did not raise the issue of the placement of the triggering event in the affidavit but focused his arguments on whether the affidavit was present at the search.

In its previous order, this court relied on the same legal principles as the *Vesikuru* court and found that the requirements for anticipatory warrants were satisfied in this case. Specifically, this court held that the requirements for anticipatory search warrants set out by the Ninth Circuit in *Hotal* and *Ramirez v. Butte-Silver Bow County*, 298 F.3d. 1022 (9th Cir. 2002), had been complied with because the triggering event was contained in the affidavit,[3] the affidavit was incorporated into the warrant by reference, and the affidavit was in the immediate possession of the officers at the time of the search. *See* Jan. 16, 2003 Order at 9-10. Accordingly, this court will not change its decision regarding the validity of the warrant in light of *Vesikuru*.

B. *Presentment of Affidavit*

Defendant next contends that this court erred in holding that the law in the Ninth Circuit has not yet reached the point that presentment of the affidavit specifying the triggering event along with the warrant to the people whose property is being searched is required. According to defendant, the Ninth Circuit's decision in *United States v. McGrew*, 122 F.3d 847 (9th Cir. 1997) dictates the opposite result.[4]

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[3] In his reply, defendant contends that the reference to the affidavit contained in the search warrant is "confusing and not clear." However, "there are no required magic words of incorporation." *Vesikuru*, 314 F.3d at 1121. Rather, "'suitable words of incorporation'" are all that is required. *Id.* (quoting *Ramirez*, 298 F.3d at 1026) (emphasis in *Vesikuru*). This court found that the search warrant in this case properly incorporated the affidavit by reference because it referred to the "attached affidavit." Defendant has not presented any new facts to refute this finding.

[4] Defendant contends that the court erred in not discussing *McGrew* in its order denying his motion to suppress. However, the

McGrew does not deal with an anticipatory search warrant in which the triggering event is contained in the affidavit. Rather, the affidavit incorporated into the warrant in *McGrew* contained a description of items that, could be seized. *See id.* at 849-50, 849 n.3. There was no evidence that the affidavit was present at the time of the search, and the government did not serve a copy of the affidavit on McGrew. *Id.* at 849. The *McGrew* court held that the warrant was invalid because the government did not serve McGrew with a warrant that, "either on its face or by attachment," contained "a sufficiently particular description of what is to be seized." *Id.* at 850.

In this case, the government presented evidence, and the court found, that the copy of the search warrant placed on the table by Inspector Welsh during his interview with defendant on the day of the search included Attachment A, a description of the property to be searched, and Attachment B, a list of items to be seized. (Welsh. Supp. Decl.). Defendant's wife also testified that the copy of the warrant she was given included "attachments as far as what they took, the inventory." (Hr'g Tr. Oct. 15, 2002 at 73:7-11). Therefore, *McGrew*'s holding as to proper presentment of the description of items to be seized was complied with in this case.

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parties' positions on the import of the *McGrew* decision were fully briefed and argued before this court, and considered by this court, on defendant's motion to suppress. The court is not required to specifically discuss each case cited by each party. Indeed, such a requirement would be impracticable. The court properly relied on other Ninth Circuit cases relevant to this issue, which were also presented to the court by the parties. *See* Jan. 16, 2003 Order at 10-11.

Defendant argues that *McGrew*'s holding should be applied to require affidavits containing triggering events to be presented to defendants. However, the *McGrew* court specifically contemplated circumstances in which affidavits would not be presented along with search warrants. *See id.* at 850 ("If the government wishes to keep an affidavit under seal, it must list the items it seeks with particularity in the warrant itself.").

In addition, although the Ninth Circuit has noted that one of the purposes of requiring the triggering event for an anticipatory search warrant to be on the face of the warrant or the accompanying affidavit is "to provide information to the person whose property is being searched," *Hotal*, 143 F.3d at 1227, the Ninth Circuit has not reached the presentment issue in these cases. Defendant's arguments do not persuade the court to change its decision that the search warrant in this case was valid. As this count previously noted, while the logic underlying existing Ninth Circuit case law on anticipatory search warrants may arguably be extended to support defendant's position, the Ninth Circuit has yet to hold that presentment of an affidavit such as the one in this case is required.[5] *See* Jan. 16, 2003 Order at 10-11.

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[5] Defendant further contends that the Ninth Circuit's decisions in *United States v. Hightower*, Nos. 00-50065, 00-50355, 2002 WL 1560785 (9th Cir. July 15, 2002) and *Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747 (9th Cir. 1989), require presentment of the affidavit. First, *Hightower* is an unpublished decision which may not be cited. Second, although it is true that, in both of these cases, affidavits were not given to the defendants, neither of these cases involved an anticipatory search warrant or require presentment in the circumstances of this case. Moreover, unlike the warrant in this case, the warrants in those cases did not incorporate by reference the affidavits necessary to satisfy the particu-

III. *Rule 41(d) Violation*

Finally, defendant contends that this court erred in holding that the Rule 41(d) violation in this case was technical, rather than fundamental, and that suppression of evidence is therefore required. Fundamental violations of Rule 41 (d) are "ones which are unconstitutional under traditional Fourth Amendment standards" and "require automatic suppression of the evidence produced." *United States v. Johns*, 948 F.2d 599, 604 (9th Cir. 1991).

Defendant characterizes the facts in this case as being that "no actual warrant [was] served to a resident."[6] Defendant contends that he was never served with a warrant because "he never received a complete packet."[7] However, as discussed both in this Order and

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larity requirement. *See Center Art Galleries*, 875 F.2d at 749 (holding that overbroad search warrants were not cured by more particular affidavits because the affidavits were not incorporated into the warrant by reference).

[6] Defendant relies on *United States v. Choi*, Nos. 98-10080, 98-10101, 98-10122, 1999 WL 386660 (9th Cir. May 21, 1999), a case cited by this court in a footnote in its January 16, 2003 Order, for the proposition that "serving the face sheets of a warrant without the affidavits or excerpted lists is not even service of the search warrant." The court recognizes that it erred in citing *Choi*, an unpublished opinion, in its previous order. *See* 9th Cir. Rule 36-3. The reference to Choi should not have been made and was not necessary to the reasoning or result of this court's prior order. Accordingly, the court takes this opportunity to strike the language in footnote 6 of the court's January 16, 2003 order regarding *Choi*, and the court will not address *Choi* here.

[7] Defendant quotes *United States v. Towne*, 997 F.2d 537 (9th Cir. 1993) as stating that "[a]ll documents that agents rely upon to satisfy Fourth Amendment requirements constitute the 'search warrant.'" First, *Towne* does not even discuss Rule 41(d). Second, defendant misattributes a sentence from *Choi* (after which the

the court's January 16, 2003, Order, Inspector Welsh placed a copy of the warrant along with Attachments A and B on the table during his interview with defendant. In addition, copy of the warrant along with a list of items seized was left with defendant's wife. *See* Section II (B), *supra*; Jan. 16, 2003 Order at 4, 15.

Defendant has not previously argued that the Rule 41(d) violation in this case was fundamental. Rather, defendant relied on *United States v. Gantt*, 194 F.3d 987 (9th Cir. 1999), a case dealing with non-fundamental Rule 41(d) violations, in contending that Rule 41 (d) was violated in this case because defendant was not presented with a warrant at the outset of the search and that this violation required suppression because it was deliberate. This court agreed with defendant that a Rule 41(d) violation occurred in this case, but held that the violation was technical and that suppression was

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court cited to *Towne*) as a quotation from *Towne* itself. As noted in the previous footnote, *Choi* is an unpublished opinion that cannot be cited. Moreover, in *Towne*, the Ninth Circuit stated that "'[t]he documents that are in fact relied upon to serve these varied functions simply are 'the search warrant' for purposes of constitutional analysis." *Id.* at 548 (emphasis in original). The functions the Ninth Circuit referred to were limiting the discretion of officers executing a warrant, giving the person being searched notice of the specific items that may be seized, and guaranteeing that the magistrate issuing the warrant is aware of the scope of the search. *Id.*

In the present case, defendant and his wife were given notice of the items that could be seized. Moreover, in *McGrew*, as discussed at Section II(B), supra, the Ninth Circuit contemplated that a warrant could be valid even if an affidavit was not presented to a defendant. Therefore, defendant's apparent argument that *Towne* somehow stands for a Ninth Circuit rule requiring all documents related to a warrant to be served on defendant in order to satisfy Rule 41(d) is meritless.

not required.[8] *See* Jan. 16, 2003 Order at 11-16. In the absence of any new facts or circumstances, new law on this issue, or argument that this court misapplied Ninth Circuit precedent on this issue, defendant's mere disagreement with the court's holding does not mandate reconsideration.

IT IS THEREFORE ORDERED that defendant's motion for reconsideration be, and the same hereby is, DENIED.[9]

DATED: February 13, 2003

/s/ William B. Shubb
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

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[8] Moreover, this court held that the search warrant in this case was supported by probable cause as to the video tape, that defendant's other arguments regarding lack of probable cause were moot because the government has stated that it will not offer evidence other than the video tape at trial, and that the warrant was a valid anticipatory search warrant. *See* Jan. 16, 2003 Order at 4-9. Therefore, the requirements of the Fourth Amendment have been complied with in this case.

[9] Defendant filed another brief on these issues after the hearing on his motion for reconsideration. No further briefs on this matter will be considered by this court.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CR. S-02-164 WBS
UNITED STATES OF AMERICA, PLAINTIFF

v.

JEFFREY GRUBBS, DEFENDANT

Filed: Jan. 16, 2003

MEMORANDUM AND ORDER

This matter came on for hearing on the motion of defendant Jeffrey Grubbs to suppress evidence obtained as the result of a search of his residence on April 19, 2002 and to suppress statements made by defendant to officers on April 19, 2002. The court heard testimony, received and considered documentary evidence, and heard the arguments of counsel. The following constitutes the court's findings of fact and conclusions of law.

I. *Factual and Procedural Background*

On December 20, 2001, defendant responded to an undercover advertisement that had been placed on tow internet newsgroups entitled, "alt.binaries.pictures.erotic.children" and "alt.sex.pedophile" by a United

States Postal Inspector. (SW Aff. ¶¶ 21, 23). The undercover web page operated by the Postal Service describes a collection of videotapes depicting minors engaged in sexually explicit conduct. (*Id.* ¶ 29). On December 27, 2001, an undercover postal inspector received an order from defendant for a videotape entitled "Lolita Mother and Daughter." (*Id.* ¶ 30). On February 5, 2002 the postal inspector received a letter from defendant which gave his address as "1199 Park Tarrace [sic] Dr., Galt, CA 95632.'" (*Id.* ¶ 42). The envelope also contained $45.00 in U.S. Currency. (*Id.*)

On April 17, 2002, based on this transaction, United States Postal Inspector Gary R. Welsh presented an "Application and Affidavit for Anticipatory Search Warrant" to Magistrate Judge John F. Moulds. The affidavit requests an anticipatory search warrant to search defendant's residence if he "or any other individual at the residence accepts the mail package containing the videotape and takes it into 1199 Park Terrace Drive, Galt, CA 95632." (*Id.* ¶¶ 14; 61) .

In the affidavit, Inspector Welsh identified himself as the Child Sexual Exploitation Specialist for the Northern California Division and detailed his experience and training in the area of child pornography and child sexual exploitation. (*Id.* ¶¶ 1-12). Inspector Welsh also described the videotape requested by defendant as containing child pornography as defined in 18 U.S.C. § 2256(2). (*Id.* ¶ 56). Inspector Welsh stated that the tape "depicts a nude, juvenile female, approximately 10 to 13 years of age, engaged in sexually explicit conduct with a nude adult female appearing to be approximately 20 to 30 years of age." (*Id.*). Magistrate Judge Moulds signed the search warrant on April 17, 2002. The word

"anticipatory" was handwritten on the face of the warrant.

On April 19, 2002, at approximately 7:20 A.M., an undercover postal inspector delivered a package containing the videotape to defendant's residence. The package was signed for and taken into the residence by Carol Bradstreet, defendant's wife. (Welsh Decl. ¶ 2). At approximately 7:25 A.M., Inspector Welsh, together with six other postal inspectors and three uniformed patrol officers from the Galt Police Department, executed the search warrant at defendant's residence. (*Id.* ¶ 1). The officers were armed during the search but did not have their guns drawn. (Tr. Esteban Test. at 16:18-17:11, 29:15-17; Tr. Bradstreet Test. at 75:10-16).

At approximately 7:24 A.M., an inspector observed defendant leaving the residence. He approached defendant, identified himself as a police officer, and told defendant to remain where he was standing. (Welsh Decl. ¶ 4). Inspector Welsh then approached defendant outside his residence and, said, "'You know why we're here.'" (Tr. Welsh Test. at 45:20-46:3). Defendant responded that he knew why the officers were there and that the package was in the garage. (*Id.* at 46:10-14; Tr. Esteban Test. at 20:17-21:4). Defendant was assured that he was not under arrest at that time. *(Id.* at 46:15-17).

Approximately thirty minutes elapsed between the time the officers approached the house and the time that Inspector Welsh, Inspector Esteban, and defendant entered the house and sat down to talk. (*Id.* at 47:6-13). During this time, some of the officers conducted a protective sweep of the residence. (Tr. Esteban Test. at 23:5-19; Welsh Decl. ¶ 11). Some of the officers also checked defendant's children's backpacks

before they went to school, took photographs of the house, and made sketches of the house. (Tr. Welsh Test. at 47:6-48:1).

At approximately 7:53 A.M., defendant was advised of his Miranda rights. (Welsh Decl. ¶ 15; Tr. Welsh Test. at 48:14-11). Inspector Welsh put a copy of the search warrant on the table around which he, Inspector Esteban, and defendant were seated. (Tr. Welsh Test. at 48:20-49:2). The search warrant affidavit was in the possession of the officers at the search. (*Id.* at 52:8-10). However, the affidavit was not presented to defendant or his wife or left at defendant's residence. (Hr'g Tr. Oct. 23, 2002 at 3:21-4:12).

During the interview, defendant signed a consent form allowing the officers to remove and search his computer, CD-roms, and floppy diskettes. (Welsh. Decl. ¶18). After the interview, which lasted for approximately one hour, defendant was arrested for violating the child pornography laws. (*Id.* at 51:2-14). The indictment in this case charges defendant with receiving a visual depiction of a minor engaged in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(2). (April 25, 2002 Indictment).

II. *Discussion*

A. *Probable Cause for Search*

First, defendant moves to suppress the evidence seized during the search of his residence on April 19, 2002 on the ground that probable cause did not exist to support the issuance of the warrant. The issuance of a search warrant is reviewed for clear error. *See United States v. Fullbright*, 105 F.3d 443, 453 (9th Cir. 1997) ("The magistrate making the original determination of probable cause is accorded significant deference by the

reviewing court."). In determining whether to issue a search warrant a magistrate must simply "'make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *United States v. Hay*, 231. F.3d 630, 634 n.4 (9th Cir. 2000) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). This court must therefore determine "whether there was a '*substantial basis*' for concluding that the warrant was supported by probable cause." *Fullbright*, 105 F.3d at 453. (emphasis added).

1. *The Video Tape*

Defendant contends that the magistrate judge did not have a substantial basis to issue a warrant because he did not have probable cause to believe that the video tape ordered by and delivered to defendant contained illegal child pornography. Specifically, defendant contends that Inspector Welsh's statements in the search warrant affidavit regarding his training in the field of child pornography do not establish: 1) that he is qualified to estimate the ages of the people in the video tape or 2) whether the depictions in the video tape were of real people or were morphed images.

In this case, Inspector Welsh's affidavit provided Magistrate Judge Moulds with a substantial basis to conclude that the warrant was supported by probable cause. In the affidavit, Inspector Welsh set forth in detail his training and investigative experience in the areas of child pornography, child sexual exploitation, and molestation. (SW Aff. ¶¶ 2-12). Inspector Welsh stated that he has had training in "identifying and approximating the age of models, actors, and victims depicted in pornographic materials and investigating

violations of federal and state laws relating to the sexual exploitation of minors." (*Id.* ¶ 2). These statements are sufficient to establish Inspector Welsh's qualifications to give the magistrate judge a description of the contents of the video tape. *Cf. United States v. Ruddell*, 71 F.3d 331, 334 (9th Cir. 1995) (referring to an affidavit from a postal inspector making statements similar to those of Inspector Welsh regarding her training in the area of sexual exploitation of minors as an expert declaration).

In the affidavit, Inspector Welsh gave a detailed factual description of the contents of the video tape ordered by defendant and stated that the video contained child pornography as defined in 18 U.S.C. § 2256(2). (SW Aff. ¶ 56); *see United States v. Chrobak*, 289 F 3d 1043, 1045 (8th Cir. 2002) (citing *New York v. P. J. Video, Inc.*, 475 U. S. 868, 873-74 (1986)) (stating that in making a determination as to whether images are child pornography, "the judge must either view the images or rely on a detailed factual description of them."). Inspector Welsh also stated that the video "depicts a nude juvenile female, approximately 10 to 13 years of age, engaged in sexually explicit conduct" and went on to describe that conduct in detail. (*Id.*); *cf. United States v. Brunette*, 256 F.3d 14, 17 (1st Cir. 2001) (finding that probable cause to believe that an image was child pornography did not exist when the affiant merely "parroted" the applicable statutory definition without a description of the images). As the Ninth Circuit has noted, "[c]ommon sense suggests that most of the time one can tell the difference between a child and an adult." *United States v. Weigand*, 812 F.2d 1239, 1243 (9th Cir. 1987).

It was also reasonable for Magistrate Judge Moulds to infer from Inspector Welsh's description of the tape that it depicted actual people, not morphed images. *See United States v. Rowland*, 145 F.3d 1194, 1205 (10th Cir. 1998) ("In making the probable cause determination, the issuing magistrate may draw reasonable inferences from the material provided in the warrant application."). Absent any evidence to the contrary, it is reasonable to infer that when someone refers to a "female," as Inspector Welsh did in the affidavit, he or she is referring to an actual person rather than a morphed image. While defendant may be able to prove at trial that the images contained in the video tape were in fact morphed, that does not compel the conclusion that probable cause did not exist to support the issuance of the search warrant. *See, e.g., Borunda v. Richmond*, 885 F.2d 1384, 1389 (9th Cir. 1988) (noting that "[t]he state's failure to prove guilt beyond a reasonable doubt does not mean in connection with the arrests that it did not meet the lesser probable cause standard").

Because Inspector Welsh was qualified to estimate the ages of the people depicted in the video tape, because Inspector Welsh set forth a detailed description of the contents of the video tape, and because the inference that the video tape contained real people was reasonable, Magistrate Judge Moulds had a substantial basis for concluding that the warrant in this case was supported by probable cause as to the video tape.

2. *Items Other than the Video Tape*

Defendant next contends, relying on *United States v. Weber*, 923 F.2d 1338 (9th Cir. 1991), that probable cause did not exist to support the issuance of the search warrant for items in defendant's home other than the

video tape itself.[1] Defendant's argument on this point is moot because the Government has stated that it will not admit any of the items, other than the video tape, that were seized from defendant's home at trial. (Gov't Opp'n at 13). Accordingly, the court need not reach the issue of whether Magistrate Judge Moulds had a substantial basis for concluding that the warrant to search for items other than the video tape was supported by probable clause.

B. *Validity of Consent to Search Defendant's Computer*

Second, defendant contends that any consent obtained from him to search any of his belongings was not given voluntarily. This argument is also moot because the Government will not offer any evidence taken from the defendant's residence at trial other than the video tape. Accordingly, the court need not address the validity of defendant's consent.

C. *Anticipatory Search Warrant*

Third, defendant contends that the search warrant in this case was a "forthwith" warrant, not an "anticipatory warrant," and that it is deficient because it was issued without a requirement, that a crime be committed before the search of defendant's house. An anticipatory warrant authorizing a search for materials that would arrive as a result of a controlled delivery by the government is permissible. *See Weber*, 923 F.2d at 1343 n.5 (citing *United States v. Hale*, 784 F.2d 1465, 1468-69 (9th Cir. 1986)). "[I]n order to comply with the Fourth Amendment, an anticipatory search warrant must either on its face or on the face of the accompanying affidavit, clearly, expressly, and narrowly specify the triggering event." *United States v. Hotal*, 143 F.3d 1223, 1227 (9th Cir. 1998); *see also Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022, 1026 (9th Cir. 2002) ("[A] warrant may be construed with reference to the affidavit . . . if (1) the affidavit accompanies the warrant and (2) the warrant uses suitable words of reference which incorporate the affidavit.") (internal quotation and citation omitted). The warrant and its attachments must be in the immediate possession of those executing the search "in order to guide their actions and to provide information to the person whose property is being searched." *Id.*

In this case, while the word "anticipatory" was handwritten on the face of the warrant, the triggering event, the delivery of the video tape, was not included on the face of the warrant. However, the triggering event is specified in the affidavit attached to the warrant. (SW Aff. ¶¶ 14, 61). The warrant incorporated the affidavit by reference. (SW (referring to "attached affidavit")). The warrant and affidavit were also in the immediate possession of the officers while they searched defendant's residence. (Tr. Welsh Test. at 52:8-10 (stating that he had the affidavit with him at the search and that the other members of the team were made aware of the

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[1] In *Weber*, the Ninth Circuit held that boilerplate recitations in a warrant affidavit that child pornography collectors, child molesters, and pedophiles were likely to keep certain things such as diaries and sexual aids at their residences were insufficient to establish probable cause to search for those items. *Id.* at 1345. The court noted that the defendant did not deny that probable cause existed as to the pornographic materials that arrived at his home as a result of the Government's controlled delivery. *Id.* at 1343.

contents of the affidavit)).[2] Thus, the officers complied with the requirements set forth by the Ninth Circuit in *Hotal* and *Ramirez*.

Defendant argues that *Hotal* also requires the affidavit to be presented with the warrant to the people whose property is being searched. The government has stipulated that the affidavit was not presented to defendant or his wife or left at the premises. (Hr'g Tr. Oct. 23, 2002 at 3:21-4:12). Both the *Hotal* and *Ramirez* courts emphasized that one of the purposes of requiring officers to maintain the warrant and its attachments in their immediate possession while conducting a search is "to provide information to the person whose property is being searched." *Id.*; *see also Ramirez*, 298 F.3d at 1027 ("To stand a real chance of policing the officers' conduct, individuals must be able to read and point to

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[2] Defendant argues that this evidence is insufficient; however, he presents no evidence to the contrary. Inspector Welsh testified that he carried the warrant with him in his jacket pocket folded into thirds. Defendant points out that the affidavit was not attached to the copy of the warrant that was given to defendant's wife after the search. In light of Inspector Welsh's testimony that the affidavit was present, the court will not draw the inference that the affidavit was not at the search based on defendant's speculative argument about whether or not a document of that length could be carried in the way Inspector Welsh said it was. Also, the conclusion that the affidavit was not present at the search does not follow from the fact that it was not attached to the copy given to defendant's wife. The officers may have removed the affidavit before giving the copy to her or carried it separately from the warrant itself. In *Hotal*, defendant made the argument that the affidavit was not present at the search, and the court noted that the government was aware of the argument but still offered no evidence that the affidavit accompanied the warrant at the search, and did not even make an argument to that effect. *Hotal*, 143 F.3d at 1126. That is not the case here.

the language of a proper warrant."). Given this purpose, it is logical that officers would be required to actually present the affidavit setting forth the triggering event to the people whose property they are searching in order to provide those people with information regarding the parameters of the search.

However, the *Hotal* court did not reach the issue of whether officers must present the affidavit to the people whose property is being searched. Instead, the Ninth Circuit held that the warrant in *Hotal* was deficient because there was no evidence that the officers brought the affidavit with them to the search or that it "in any manner accompanied the warrant." *Id.* at 1225. Therefore, while *Hotal*'s underlying reasoning might support defendant's argument that the affidavit setting forth the triggering event for an anticipatory warrant must be presented to the people whose property is being searched, the law has not, yet reached the point where such presentment is required. This court will not extend *Hotal*'s reasoning to require presentment in the absence of specific guidance from the Ninth Circuit.

D. *Rule 41(d)*

Fourth, defendant argues that evidence obtained from the search of his residence should be suppressed because Federal Rule of Criminal Procedure 41(d) was violated. Rule 41(d) requires that "[t]he officer taking property under the [search] warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken . . ." The Ninth Circuit has held that "[a]bsent exigent circumstances, Rule 41(d) requires service of the warrant at the outset of the search on persons present at the search of their premises." *United States v. Gantt*, 194 F.3d 987, 990 (9th Cir. 1999).

Defendant contends that Rule 41(d) was violated in this case because defendant was not presented with a copy of the warrant at the outset of the search. Defendant was first approached by officers outside his residence at approximately 7:25 A.M. on April 19, 2002. He was not given a copy of the warrant until Inspector Welsh put a copy of the warrant down on defendant's dining table at approximately 7:53 A.M.

The government contends that the actions taken by the officers before defendant was given a copy of the warrant were part of a protective sweep and did not constitute a search. Because the purpose of a protective sweep is to protect the arresting officers, it is "not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger. . . ." *Maryland v. Buie*, 494 U.S. 325, 355-56 (1990); *see also United States v. Furrow*, 229 F.3d 805, 812 (9th Cir. 2000) (A "protective sweep" is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding.") (citation omitted), *overruled on other grounds by United States v. Johnson*, 256 F.3d 895 (9th Cir. 2001).[3]

During the approximately thirty-minute time lapse before defendant was shown a copy of the warrant, the officers looked through defendant's children's backpacks and began taking photographs and making

[3] In *Johnson*, the only part of *Furrow* that was overruled was its holding that a district court's determination of where the curtilage ends should be reviewed for clear error.

sketches of the house. (Tr. Welsh Test. at 47:6-48:1). Inspector Welsh testified that he checked the backpacks "as per safety procedures and to make sure that nothing was leaving the house" in order to get the children to school on time. (Tr. Welsh Test. at 47:17-19). Looking in the children's backpacks and photographing and sketching the house constituted a search because these actions went beyond the cursory visual inspection allowed by the protective sweep doctrine. Clearly, a person who might potentially pose a danger to the officers could not be hiding in a child's backpack.[4] In addition, photographing and sketching the house has no obvious relationship to the safety of the officers performing the search.[5] Accordingly, because a search

[4] The Ninth Circuit has noted that *Buie* may call into question its case law allowing protective sweeps for the purpose of preventing the destruction of evidence. See *United States v. Johnson*, No. 92-30278, 1993 WL 385433, at *4 n.1 (9th Cir. Sept. 29, 1993) (stating that the court "need not decide . . . whether *Buie* overruled our previous decisions allowing protective sweeps to prevent the destruction of evidence . . . .") (internal citation and quotation omitted). Even if the Ninth Circuit's pre-*Buie* cases allowing protective sweeps to prevent the destruction of evidence are still good law, the Ninth Circuit has also stated that while performing the cursory inspection allowed by the protective sweep doctrine, "officers may only seize evidence found in plain view." *Id.* Any evidence in defendant's children's backpacks in this case would not be in plain view and thus the search of the backpacks was outside the scope of the protective sweep doctrine.

[5] Additionally, the crime for which defendant was investigated and subsequently arrested was not one that would lead to the conclusion that defendant would pose a high risk of danger to arresting officers. *See Furrow*, 229 F.3d at 812 (noting that in *Buie*, the Supreme Court, in defining the protective sweep, emphasized "the seriousness of the crime involved, and the need for law enforcement to protect themselves by securing the scene and

took place before defendant was shown a copy of the search warrant, Rule 41(d) was violated.

However, the determination that there was a violation of Rule 41(d) does not end the inquiry because a violation of Rule 41(d) does not necessarily require suppression. *Gantt*, 194 F. 3d at 994. "Under Ninth Circuit law, 'technical.' violations of Rule 41(d) require suppression only if there was a, 'deliberate disregard of the rule' or if the defendant was prejudiced." *Id.* (quoting *United States v. Negrete-Gonzales*, 966 F.2d 1277, 1283 (9th Cir. 1992)). The court must therefore determine whether the failure to give defendant a copy of the warrant at the outset of the search in this case was done in deliberate disregard of Rule 41(d) or resulted in prejudice to defendant.

Whether the conduct of searching officers constitutes a violation of Rule 41(d) is a fact-based inquiry. *See, e.g. id.* at 994-95 (considering the facts surrounding the Rule 41(d) violation in determining whether the officers deliberately disregarded the rule); *United States v. Stockheimer*, 807 F.2d 610, 613-14 (7th Cir. 1986) (same). In *Gantt*, the Ninth Circuit held that the Rule 41(d) violation was deliberate because the officers failed to show the defendant the complete warrant even after she asked to see it.[6] *See id.* (rejecting government's

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preventing surprise attacks by coconspirators.") (citing *Buie*, 494 U.S. at 333).

[6] The court has found little case law as to what constitutes "deliberate disregard" in this context. *Gantt* is the most enlightening Ninth Circuit case on the issue. In most of the other cases, the courts simply look to the facts of the particular case in determining whether there was deliberate disregard of the rule. For example, in *United States v. Choi*, Nos. 98-10080, 98-10101, 98-10122, 1999 WL 386660, at *2 (9th Cir. May 21, 1999), the Ninth Circuit held

argument as to why Attachment A, listing items to be seized, was not shown to the defendant when she asked to see the warrant). In this case, there is no evidence that defendant asked to see the warrant before a copy was shown to him at the dining table by Inspector Welsh.[7] In addition, the officers had nothing to gain by disregarding the rule in this case. Therefore, the officers in this case did not deliberately disregard Rule 41(d).

Furthermore, there is no evidence that defendant has been prejudiced in any way by the Rule 41(d) violation. *See United States v. Johns*, 948 F.2d 599, 604 (9th Cir. 1991) (stating that prejudice in the Rule 41(d) context means that the "search might not have occurred or

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that a violation was deliberate where the government had not trained its agents to leave a copy of affidavits that cured facially overbroad warrants with the warrants. There is no similar allegation here regarding lack of training.

[7] Defendant's wife testified that when she got back from taking the children to school, she repeatedly asked the officers "What's going on?" (Tr. Bradstreet Test. at 70:14-71:9, 72:18 22). She also testified that she did not receive a copy of the warrant until the officers left the residence. (*Id.* at 72:23-73:18). It is unclear what time it was when defendant's wife began asking the officers what was going on. She testified that when she got back from the school, the officers and her husband were already in the house. (*Id.* at 69:22-25). Because Inspector Welsh put the copy of the search warrant on the table shortly after entering the house with defendant and preparing to interview him, it is likely that defendant's wife did not start questioning the officers as to what was happening until after her husband had been shown the warrant. In addition, unlike the defendant in *Gantt*, defendant's wife did not specifically ask to see the warrant. Taken together with the fact that defendant never asked to see the warrant, his wife's testimony does not justify a reasonable inference that the officers' Rule 41(d) violation was deliberate.

would not have been so abrasive if the rule had been followed"). Accordingly, the technical violation of Rule 41(d) that occurred in this case does not require suppression.

E. *Alleged* Miranda *Violation*

Finally, defendant contends that statements he made to Inspector Welsh before he received *Miranda* warnings should be suppressed. "The Supreme Court's holding in *Miranda* . . . generally precludes the evidentiary use of statements resulting from a custodial interrogation unless the suspect has first been advised of his or her constitutional rights." *Alvarado v. Hickman*, No. 00-56770, 2002 WL 31829483, at *3 (9th Cir. Dec. 18, 2002) (citations omitted). The question of whether a person is in custody is answered by looking at the totality of the circumstances. *Id.* (citing *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)). "Based upon a review of all the pertinent facts, the court must determine whether a reasonable innocent person in such circumstances would conclude that after brief questioning he or she would not be free to leave." *United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1981).

The government has acknowledged that, prior to the time Inspector Welsh approached defendant outside his residence, defendant was detained by law enforcement officers. (Gov't Response to Def.'s Br. after Hr'g on Mot. to Suppress Evidence at 8-9). The government concedes that "'in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" (*Id.* at 9 (citing *United States v. Mendenhall*, 466 U.S. 544, 554 (1979))). This concession that defendant was not free to leave is tantamount to a concession that defendant was, in fact, in custody.

The court must next determine whether the incriminating statements defendant made before he received the *Miranda* warnings were the result of interrogation. The Supreme Court has held "that interrogation may be 'either express questioning or its functional equivalent,' and defined the latter to include any statements or actions 'that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *Booth*, 669 F.2d at 1237 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980)).

In this case, Inspector Welsh approached defendant and immediately said, "You know why we're here." (Welsh Decl. ¶ 8; Tr. Welsh Test. at 45:18-46:9).[8] Defendant responded that he did and that the package was in the garage. (Tr. Welsh Test. at 46:10-14). Inspector Welsh's statement could at most be found to be likely to elicit a "yes" or "no" statement from defendant as to whether he knew why the officers were there. Inspector Welsh could not have known that defendant

[8] Inspector Esteban testified that Inspector Welsh said, "'You know why we're here, don't you?"', (Tr. Esteban Test. at 20:13-16), or "'Do you know why we're here?"' (*Id.* at 25:14-26:6). In response to the government's question as to whether Inspector Esteban was unsure about whether Inspector Welsh asked defendant a question, Inspector Esteban testified that he was nervous and then stated that he was not unsure and that Inspector Welsh had approached defendant and "words were exchanged." Inspector Welsh, however, specifically stated that he did not make a statement to defendant in the form of a question because he did not want to ask any questions before issuing *Miranda* warnings. (Tr. Welsh Test. at 46:1-9). In light of Inspector Welsh's testimony that he did not ask defendant a question and Inspector Esteban's apparent failure to remember exactly what Inspector Welsh said, the court finds that Inspector Welsh made a statement to defendant outside his residence and did not ask him a question at that time.

would have responded to the statement by giving the location of the package containing the tape. Therefore, Inspector Welsh's statement to defendant outside his residence did not constitute interrogation. Accordingly, because defendant's statement regarding the location of the package was not the result of interrogation, suppression of the statement is not required.

IT IS THEREFORE ORDERED that defendant's motion to suppress be, and the same hereby is, DENIED.

DATED: January 15, 2003

/s/ William B. Shubb
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

United States District Court
EASTERN DISTRICT OF CALIFORNIA

In the Matter of the Search of
(Name, address or brief description of person or property to be search)

ANTICIPATORY SEARCH WARRANT

Residence of Jefferey Grubbs
1199 Park Terrace Drive
Galt, CA 95632

CASE NUMBER: SW-02-0061 JFM

TO: **Gary R. Welsh, United Statess Postal Inspector**, and any Authorized Officer of the United States

Affidavit(s) having been made before me by who has reason to believe that ( ) on the person of or (X) on the premises known as (name, description and/or location)
residence of Jeffrey Grubbs, 1199 Park Terrace Drive, Galt, CA 95632, as more particularly described in Attachment A to the attached Affidavit,
in the Eastern District of California there is now concealed a certain person or property, namely (describe the person or property to be seized)
the records and materials described in Attachment B to the attached Affidavit.

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed or the person or premises above-described and establish grounds for the issuance of this warrant.

YOU ARE HEREBY COMMANDED TO SEARCH ON OR BEFORE April 27, 2002
DATE

(not to exceed 10 days) the person or place named above for the person or property specified, serving this warrant and making the search **in the daytime - 6:00 A.M. - 10:00 P.M.** - and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken and prepare a written inventory of the person or property seized and promptly return this warrant to JOHN F. MOULDS
as required by law. U.S. Judge or Magistrate Judge

April 17, 2002 1:47p.m at **Sacramento, California**
Date and Time Issued City and State

JOHN F. MOULDS, U.S. Magistrate Judge /s/ John F. Moulds
Name and Title of Judicial Officer Signature of Judicial Officer

APPENDIX E

ATTACHMENT A

DESCRIPTION OF PROPERTY TO BE SEARCHED

The premises known as 1199 Park Terrace Drive, Galt, CA 95632 is a two-story house located on the east side of Park Terrace Drive. The front of the structure faces west and is a corner house on the intersection of Park Terrace Drive and CA State Route 104. The house is gray with white trim. Facing the property from Park Terrace Drive, there is a large tree to the immediate right (south) of the driveway. A lawn and large shrubs generally separate the front of the house with the sidewalk and street to the west. To the north, a large red masonry wall separates the property from State Route 104. All the windows, both first and second floors, that face Park Terrace Drive are multi-paned windows trimmed in white. The structure's tri-level roof is constructed of Spanish tile. The attached two-car garage is set forward of the main dwelling on the south side of the house and has white paneled roll-up door. The front door is white and is set up underneath an overhanging porch. The numbers "1199" made of a brass-appearing material are affixed just to the upper left of the garage door.

ATTACHMENT B

LIST OF ITEMS TO BE SEIZED

1. VHS Videotape entitled "Lolita Mother and Daughter" with the initials "GW" and the date "4-9-02."

2. Cardboard videotape cassette sleeve printed bearing "SONY 6 hrs (EP) Premium Grade T-120 VHS."

3. U.S. Postal Service cardboard mailing container addressed to "Jeff Grubbs, 1199 Park Terrace Drive, Galt, CA 95632, "with a return address of J. E., P.O. Box 1353, Huron, SD 57350, and packing paper originally contained within.

4. Any and all Web TV systems and components, including but not limited to, receiver boxes, keyboards, cables, monitors, instruction manuals, and storage containers.

5. Any and all records, documents or materials, including correspondence pertaining to the possession or receipt of visual depictions of minors engaged in sexually explicit conduct, as defined in Title 18, United States Code, Section 2256(2).

6. Any and all books and magazines containing visual depictions of minors engaged in sexually explicit conduct, as defined in Title 18, United States Code, Section 2256(2).

7. All originals and all copies and all negatives of visual depictions of minors engaged in sexually explicit conduct, as defined in Title 18, United States Code, Section 2256(2).

8. Any and all motion picture films and video cassettes of visual depictions of minors engaged in sexually explicit conduct, as defined in Title 18, United States

Code, Section 2256(2), or video recordings which are of or pertain to sexually explicit images of minors or child pornography even if self produced.

9. Any and all records documents or materials including envelopes, letters, and other correspondence offering to transmit through interstate commerce including by United States Mails or by computer, any visual depictions of minors engaged in sexually explicit conduct, as defined in Title 18 United States Code, Section 2256(2).

10. Any and all records documents or materials including any and all envelopes, letters, and other correspondence identifying persons transmitting, through interstate commerce including by United States Mail or by computer, any visual depiction of minors engaged in sexually explicit conduct, as defined in Title 18, United States Code, Section 2256(2).

11. Any and a11 records documents or materials including any and all books, ledgers, and records relating to the production reproduction, receipt, shipment, order, requests, trades, purchases, or transactions of any kind involving the transmission, through interstate commerce including by United States Mails or by computer, any visual depiction of minors engaged in sexually explicit conduct, as defined by Title 18, United States Code, Section 2256(2).

12. Any and all records documents or material including any and all address books, mailing lists, supplier lists, mailing address labels, computer password documentation, and any all documents and records pertaining to the preparation, purchase, and acquisition of names or lists of names to be used in connection with purchase, sale trade, or transmission, through inter-

state commerce including by United States Mail or by computer, any visual depiction of minors engaged in sexually explicit conduct, as defined in Title 18, United States code, Section 2256(2).

13. Any and all records documents or materials including any and all address books, names, and list of names and addresses of minors visually depicted while engaged in sexually explicit conduct, as defined in Title 18, United States Code, Section 2256(2) .

14. Any and all records, documents or materials including any and all materials and photographs depicting sexual conduct, whether involving minors or between adults and minors.

15. Any and all records, documents or materials pertaining to an interest in child pornography or sexually explicit images of minors.

16. Any and all undeveloped or processed film.

United States District Court
EASTERN DISTRICT OF CALIFORNIA

In the Matter of the Search of
(Name, address or brief description of person or property to be search)

APPLICATION AND AFFIDAVIT FOR ANTICIPATORY SEARCH WARRANT

Residence of Jefferey Grubbs
1199 Park Terrace Drive
Galt, CA 95632

CASE NUMBER: SW-02-0061 JFM

APPENDIX F

I, **Gary R. Welsh, United States Postal Inspector**, being duly sworn depose and say:

I am a **United States Postal Inspector** and have reason to believe that ( ) on the person of (X) on the property or premises known as (name, description and/or location) **residence of Jeffrey Grubbs, 1199 Park Terrace Drive, Galt, CA 95632, as more particularly described in Attachment A to the attached Affidavit,**
in the Eastern District of California there is now concealed a certain person or property, namely (describe the person or property to be seized)
the records and materials described in Attachment B to the attached Affidavit,
which is (state one or more bases for search and seizure set forth under Rule 41 (b) of Criminal Procedure)
evidence of the commission of criminal offenses, and fruits and instrumentalities of such offenses,
concerning a violation of Title 18 United States Code, Section 2252(a)(2), facts to support a finding of Probable Cause as follows:
See attached Affidavit of Gary R. Welsh, Postal Inspector.
Continued on the attached sheet and made a part hereof. (X) Yes ( ) No

/s/ Gary R. Welsh
Signature of Affiant
GARY R. WELSH, Postal Inspector

Sworn to before me, and subscribed in my presence

April 17, 2002 at **Sacramento, California**
Date City and State

JOHN F. MOULDS
United States Magistrate Judge
Name and Title of Judicial Officer

/s/ John F. Moulds
Signature of Judicial Officer

AFFIDAVIT

1. I, Gary R. Welsh, am a Postal Inspector with the United States Postal inspection Service (USPIS), and I have been so employed for approximately 17 years. As part of my duties, I am presently assigned to the Northern California Division as the Child Sexual Exploitation Specialist responsible for investigating those cases involving the transportation via mail of child pornography and other materials declared obscene, and use of the mails to further schemes to sexually exploit minors. I have conducted numerous investigations involving the illegal use of the mails to distribute obscene materials and child pornography. I received a Bachelor of Arts degree in political science from Antioch University in 1982, and an Associate in Arts degree in Administration of Justice from Monterey Peninsula College in 1984 .

2. I have received specialized training in the area of child pornography, child sexual exploitation and molestation. I have had training in identifying typology useful in understanding, profiling and identifying violators and projecting their behavior. Also, I have had training in identifying and approximating the ages of models, actors and victims depicted in pornographic materials and investigating violations of federal and state laws relating to the sexual exploitation of minors. During my training, I have received formal instruction from U.S. Postal Inspectors, Assistant U.S. Attorneys, and Trial Attorneys from the U.S. Department of Justice, Obscenity Enforcement Unit. I am currently a member of the United States Attorney's Child Pornography/Exploitation Task Force for the Northern District of California.

3. Additionally, I have received training from psychologists, special agents from the Federal Bureau of Investigation's Behavioral Science Unit, and others who have done extensive work and/or research in investigating the sexual exploitation of children. I have investigated and/or participated in numerous investigations specifically focused on recovery of evidence of the sexual exploitation of children and executed federal search warrants of which I was the affiant and lead agent.

4. I have participated in the execution of numerous state search warrants and consent searches of locations where alleged violators were believed to have secreted the evidence of sexual exploitation of children. During these investigations, I have examined hundreds of photographs, which depict children engaged in sexual activity.

5. During the course of previous investigations, I have had the opportunity to read and examine hundreds of letters and E-mail messages between individuals describing their admitted sexual contact with children and the manner in which they exploited children for sexual gratification. I have examined hundreds of letters and E-mail messages written by individuals describing their admitted sexual fixation with children and the detailed explicit manner in which they, given the opportunity, would exploit said children for sexual gratification.

6. Between February 6-10, 1989 and March 12-16, 1990, I attended child pornography investigation advance training sessions conducted by the U.S. Postal Inspection Service at Washington, DC. Between March 18-22, 1991, I attended the U. S. Department of Justice Child Sexual Abuse Symposium at Huntsville, AL.

Further, I have continued to provide assistance and information to city, county and federal law enforcement agencies involved in similar investigations.

7. Between January, 23-28, 2000, I attended a U.S. Department of Justice sponsored training program in Orlando, FL. This training primarily focused on investigations of on-line Internet child sexual exploitation and the trafficking in child pornography.

8. Between February 3-4, 2000, I attended a U.S. Postal Inspection Service Internet Crimes training program in San Francisco, CA. This training primarily focused on investigations of on-line Internet and E-mail crimes and child sexual exploitation and the trafficking in child pornography on the Internet.

9. Between August 20-25, 2000, I attended the 12th annual Crimes Against Children Training Conference co-sponsored by the U.S. Postal Inspection Service, Dallas, TX Police Department and the Dallas, TX Children's Advocacy Center. During this training conference I received in-service training in the following areas: child pornography and Child Erotica, case studies in investigating organized child pornography rings, Internet investigations, on-line undercover tracking of child sex offenders, legal and prosecutive considerations in child exploitation investigations, U.S. Department of Justice legal update regarding child sexual exploitation case law and U.S. DOJ policy regarding investigating and prosecuting child sexual exploitation cases, and medical and forensic aspects of child sexual exploitation investigations.

10. Between February 27-28, 2002, I attended a computer child pornography exploitation investigations training class instructed at the South Bay Regional

Public Safety Training Academy in San Jose, CA. This training primarily focused on undercover investigations involving child sexual exploitation and the trafficking in child pornography on the Internet.

11. I have investigated and/or participated in approximately fifty investigations specifically focused on recovery of evidence of possession, production and/or distribution though the U. S. Postal Service of images of minors engaged in sexually explicit activity. I have participated in the execution of approximately twenty search warrants in which I was the affiant and lead agent in the investigation.

12. As part of my duties I investigate cases involving the sexual exploitation of minors (child pornography) and the use of interstate commerce, including the U.S. Mail, to transport, distribute, possess, receive and produce images. As part of my duties, I investigate violations of 18 U.S.C. §§ 2251 and 2252.

13. I am currently investigating a matter in which I have probable cause to believe Jeffery Grubbs is in violation of Title 18, United States Code, § 2252 (a) (2), which makes it a federal offense for any person to knowingly receive, or attempt to receive, images of minors engaged in sexually explicit conduct.

14. The statements contained in this affidavit are based in part on information provided by other Postal Inspectors, state and local law enforcement officers, and on my own experience and background. This affidavit is in support of a request for an anticipatory search warrant to search the residence of Jeffery Grubbs, 1199 Park Terrace Drive, Galt, CA 95632. As described in detail below, Grubbs ordered a videotape containing child pornography from an undercover law

enforcement officer, who was posing as a seller of such videotapes on the Internet. The U.S. Postal Inspection Service will deliver a package containing the child pornography videotape to the residence of Jeffery Grubbs located at 1199 Park Terrace Drive, Galt, CA 95632. Law enforcement officers will conduct surveillance of Grubb's residence at the time of the videotape delivery. If Grubbs or any other individual at the residence accepts the mail package containing the videotape and takes it into 1199 Park Terrace Drive, Galt, CA 95632, the search warrant will be executed.

15. Based upon my training and experience, and that of officers and agents with whom I have conferred, I am aware that Internet and computer technology have revolutionized the way individuals can communicate and obtain, and/or cause to be distributed, sexually explicit depictions of children. It has also revolutionized the way in which pedophiles, and others, who transact in sexually explicit depictions of children, interact with each other. The distribution of child pornography may be accomplished through a combination of personal contact, computer hookups, mailings and telephone calls. Any reimbursement would follow these same paths.

16. Persons who transact in sexually explicit images of minors often rely on personal contact, Internet e-mail, U.S. Mail, and telephonic communications, in order to sell, trade, or market those images. The development of the Internet and computer technology also allows for distribution of those images. A device known as a modem allows any computer to connect to another computer through the use of telephone lines. By connection to a host computer, electronic contact can be made to literally millions of computers around the world. A host computer is one that is attached to a

dedicated network and serves many users. These host computers are sometimes commercial online services, which allow subscribers to dial a local number and connect to a network, which is in turn connected to their host systems.

17. These service providers allow electronic mail service between subscribers and sometimes between their own subscribers and those of other networks or on the Internet. The Internet and telephone communication opportunities are ideal for the persons involved in transactions of sexually explicit depictions of children. The open and relatively anonymous communication allows the person to locate others of similar inclination and still maintain a degree of anonymity. Once contact is established, it is then possible to send text messages and graphic images.

18. In addition to the use of large service providers, persons transacting in sexually explicit depictions of children can use standard Internet connections, such as those provided by businesses, universities, and government agencies to communicate with each other and to receive and distribute pornography. These communication links allow contacts around the world. Additionally, these communications can be quick, relatively secure and as anonymous as desired. These advantages are well known and are becoming the foundation of commerce between persons transacting in sexually explicit images of children.

19. Web TV is an Internet service provider (ISP) which is available for a fee. It allows Internet communication and access without the need for a separate computer at the users location. A customer connects a Web TV receiver to his television and to a telephone line, and then registers on-line. The customer operates

the Web TV service by means of a keyboard and remote control linked to the television and Web TV receiver. Since Web TV charges for its service, the registration process includes providing personal information as well as information about how payments will be made, usually via a credit card number. Web TV maintains records for each account showing personal information about the account holder such as name, address, screen name, billing and payment information.

20. Web TV's system keeps track of the telephone number from which it is accessed each time a subscriber logs in, and also maintains a usage log which keeps track of information about each session a subscriber uses. Web TV allows each customer storage space on its computer system that is used to store such items as e-mails that have been sent, read and saved, a history of websites that have been visited and information about each of those websites.

21. On December 4, 2001, Postal Inspector Eleanor M. Lubbe, assigned to the New York Metro Division of the U.S. Postal Inspection Service, placed an undercover advertisement on two separate internet Newsgroups entitled "alt.binaries.pictures.erotic.children" and "alt.sex.pedophile." The advertisement read as follows:

> I found this excellent website. I never even thought something like this was available. Anyone can reach it at http://[REDACTED] , all you need is some patience because they are somewhat paranoid. The code they gave me was EL550611. Use this code and I can get free credit for videos. When you e-mail this company with the above code. They will give you access. Thank you and enjoy.

22. Postal Inspector Ronald H. Miller assigned to the St. Paul Field Office, U.S. Postal Inspection Service, St. Paul, MN, assists in this undercover operation. Inspector Miller, using the alias, "[REDACTED]," is the undercover agent operating the website known as [REDACTED] at: the website URL http://[REDACTED].

23. On December 20, 2001, at 12:40 a.m., Inspector Miller received an e-mail message from an individual using the e-mail address, JTWAINSCOTT@Webtv.net. The individual sending the e-mail later revealed his identity to Inspector Miller as "Jeff Grubbs." The entire text of the e-mail received by Inspector Miller was simply, "e15550611."

24. On December 20, 2001, at 1:32 p.m., Inspector Miller sent the following e-mail reply to the JTWAINSCOTT@Webtv.net (Jeffery Grubbs):

> [REDACTED] Hi, I recognize your referal [sic]! To access our site to finalization will not occur without time. Ok, I'll admit a little paranoia about this, but hey, if this works we'll both find it worth it! You must assure me 1) that you'll not devuldge [sic] any of this should you ever decide not to go further and 2) That you are not associated to law enforcement of any type. This is very real and I have been doing this for over four years with many "satisfied" customers. If you decide it's not for you, it's kewl [sic], no hard feelings, just please keep you council of me, my tastes and my materials, deal? As you can see, someone refereed you. They are credited if you order, when time comes, you'll have the same opportunities to earn "free" credits. Note: I do not ship across U.S. boarders [sic], sorry, but it is a

> policy that I will not violate. If you live outside the U.S. please do no reply, I cannot help you! So . . . . . what you are awaiting for, your next Step: 1) Go to the "Invites Only" page . . . . you'll see a disclaimer not allowing you to go further . . . Take you pointer . . . . (cursor) and scan it over the "s" on "Invitees Only" at the top of the page. It should change to a finger . . . then click! 2) It will ask for a password . . . . . Your password is [REDACTED] (that is the numbers " [REDACTED]" letters "[REDACTED]" (small "[REDACTED]") and the numbers "[REDACTED]." If this works, email me back with your promises I required in the first paragraph to go to the next step. Thanks for your [sic] ;) interest! J.E.

25. On December 21, 2001, at 1:21 a.m., Inspector Miller received the, following e-mail message from Jeffery Grubbs:

> Subject: no subject
> I am not affiliated with any law enforcement of any type. Nor would I give up any information of your existence at any time.

26. On December 21, 2001, at 12:28 p.m., Inspector Miller sent the following e-mail message to Jeffery Grubbs

> [REDACTED] Good job! This is how I've stratigized [sic] this site. Now you see we could cat [sic] anytime mono y mono, one on one. (Time agreed mutually). I do not deal over the phone, but I have found that this satisfies mine (and those certain in few of my customers that desires such interaction). If your curiosities got the better of you you probably tried to go further without success. Ok, if you click on

Special Interests or Available Titles. I have deleted the Special Interests section but will show you the key to the Available Titles when you write back and tell me the following, 1) that your intest [sic] do go into the area of the taboo and forbidden. With your previous assurance, I am safe telling you that what I have is illegal, if you don't want this rare collectable material, do not reply!!!!!!! 2) that you understand that means this may evolve in your obtaining my, material if we get that far and that you do not live outside the USA, I send strictly through the U.S. Mail, they cannot open packages without a search warrant, I have discovered this and I do not give them reason to obtain one! It is safe, but I will not subject my materials to Customs (as I mentioned in the previous email) UPS or FED-EX because all three can open materials upon a whim. I am very safe and this is proof, I care not only for my safety but yours also! 3) You may refer my site to a likeminded friends [sic] but cannot give)out my passwords. Remember, this when you email me back! We will not go further without it. I have never had a problem before with my customers, shouldn't have one now.:) I wish you well and hope to hear back from you and I'll share my "stuff" and how you may enjoy with the rest of us likeminded! :)

27. On December 21, 2001, at 3:20 p.m., Inspector Miller received the following e-mail message from Jeffery Grubbs:

> Subject: Re:
> My intrest [sic] in the taboo and forbidden is real. I live in the USA.

28. On December 24, 2001, at 10:01 a.m., Inspector Miller sent the following e-mail message to Jeffery Grubbs:

> Subject: Happy Hunting!
> [REDACTED] You are at the final step, this is it! If we've :) connected, we will be your single rare site for you to find exclusive vids on many wonderful delights we are assured that you cannot find elsewhere! Included is your last password then you'll see what we have and offer. Remember the trust we've placed in you and have respect for us to not mention this to anyone but those you may assuredly know share our "like" interest ! ! ! ! At this point we are comfortable that we will not shock you with what we have. We feel we are unique, now come see what we have! At the "Available Titles" icon, click and type in: [REDACTED]. Hope to hear from you! [REDACTED]

29. The undercover website is constructed in such a way that once the proper password is typed as instructed, a previously hidden web page is revealed. This web page describes a collection of thirteen videotapes of depicting minors engaged in sexually explicit conduct. The descriptions include the ages of the participants, specific graphic descriptions of the sexual activity contained on each of the videotapes, the prices, detailed ordering instructions, and the address to mail the order and money. As described in Paragraphs 30 and 42 of this Affidavit, Jeffery Grubbs subsequently ordered a videotape listed in the webpage as "Lolita Mother and Daughter." The videotape is described on the webpage as follows:

Lolita Mother and Daughter opens with a lovely young girl, ummmmmmm if she's over 10 I'd be shocked pleasing Mom with her finger. Mom's turn-she lays down daughter and pleases her with a huge dildo.

30. On December 27, 2001, at 9:21 p.m., Inspector Miller received the following e-mail message from Jeffery Grubbs. This message was forwarded through the undercover website subsequent to the completion of the order form blocks designed into website merchandise ordering page:

Subject: Order Placement for Videos
Importance: High
FormsCheckbox3 = Lolita Mother and Daughter
Name = Jeff Grubbs
Address = 1199 Park Terrace Dr
City = Galt
State = CA
Zip = 95632
Email_address = JTWAINSCOTT@webtv.net

31. On December 31, 2001, at 7:55 a.m., Inspector Miller sent the following e-mail message to Jeffery Grubbs:

Subject: Thanks!
[REDACTED] Thank you for your order . . . . Your selection are [sic] wonderful, you will not be disappointed . . . . I await you payment! J.E.

32. On January 8, 2002, at 7:16 a.m., Inspector Miller sent the following e-mail message to Jeffery Grubbs:

Subject: Order Placement for Videos
This is simply to inform you that we have not received payment yet! Let us know if we can be of assistance to you! J.E. [REDACTED]

33. On January 9, 2002, at 5:04 a.m., Inspector Miller received the following e-mail message from Jeffery Grubbs:

Subject: Re: Order Placement for Videos
Sent payment dec. [sic] 28 by US post if did not arive [sic] by now please email me

34. On January 9, 2002, at 12:34 p.m., INSPECTOR Miller sent the following e-mail message to Jeffery Grubbs:

Subject: Re: Order Placement for Videos
I do not know what to say, it has not arrived. J. E . [REDACTED]

35. On January 10, 2002, at 9:46 a.m., Inspector Miller sent the following e-mail message to Jeffery Grubbs:

Subject: Re: Order Placement for Videos
I just checked again this a.m., nothing . . . where did you mail it to? J.E.

36. On January 12, 2002, at 7:52 a.m., Inspector Miller received the following e-mail message from Jeffery Grubbs:

Subject: Re: Order Placement for Videos
[REDACTED] p.o. box [REDACTED] huron, sd 57359 Still want film will try one more time will mail today 01/0:12/002 [sic] hope it makes it thanks J Grubbs

37. On January 16, 2002, at 9:00 a.m., Inspector Miller sent the following e-mail message to Jeffery Grubbs:

Subject: Re: Order Placement for Videos

Sorry J, I still haven't received it, I am flying to Thailand . . . :) in two days. I hope you order makes it before then! J.E.

38. On January 19, 2002, at 7:50 a.m., Inspector Miller received the following e-mail message from Jeffery Grubbs:

Subject: Re: Order Placement for Videos
Do not know if you have left yet. If not hope it has made it please send word. Thanks JT

39. On January 26, 2002, at 8:12 a.m., Inspector Miller received the following e-mail message from Jeffery Grubbs:

Subject: Re: ?
wondering of you ever got letter please let me know jtwainscott

40. On February 1, 2002, at 4:53 a.m., Inspector Miller received the following e-mail message from Jeffery Grubbs:

Subject: Re:
just wondering if you ever got that

41. On February 5, 2002, at 9:40 a.m., Inspector Miller sent the following e-mail message to Jeffery Grubbs:

Subject: Re: Order Placement for Videos
J.T. I just got: back from my Thailand trip. Have you ever been there? Wow, what a wonderful place to visit! I can give you suggestions if you ever want. to go! Four main areas for "fun" action . . . . enough of that now, just want to get this to you to let you know when I picked up the mail this a.m. I noticed your letter. Thanks, I will get to your order

as soon as possible, please be patient, I am a little backed up ok?:) Thanks! J. E.

42. On February 5, 2002, Inspector Miller received a U.S. Mail first class envelope in his undercover post office box in Huron, SD. The letter was postmarked in Sacramento, CA on January 12, 2002. Sacramento, CA is approximately 26 miles north of Galt, CA. The envelope contained $45.00 in U.S. Currency. Also contained the mailing envelope was a hand written letter which bore the following text: I hope this makes it to you please send film asap thanks Jeff Grubbs 1199 Park Tarrace [sic] Dr., Galt, CA 95632."

43. On February 5, 2002, at 3:10 p.m., Inspector Miller received the following e-mail message from Jeffery Grubbs:

Subject: Re: Order Placement for Videos
Thanks! Just happy it got thare [sic] I have all the time in the world so take care of things hope you had grate [sic] time in tiland [sic] sounds like it looking forword [sic] to reciving [sic] from you thank you JT.

44. On March 8, 2002, at 5:40 p.m., Inspector Miller received the following e-mail message from Jeffery Grubbs:

Subject: Re: Looking forword [sic] to dilivery [sic]
Have not receved [sic] order. Hope you have sent it know you were backed up after trip. Please let me know JTWainscott

45. On March 11, 2002, at 12:30 p.m., Inspector Miller sent the following e-mail message to Jeffery Grubbs:

Subject: Re: Looking forword [sic] to dilivery [sic]

Sickness . . . . Accident . . . Snowstorm . . . . Sorry it was delayed, I will express it if you'd like at my charge! J.E.

46. On March 12, 2002, at 3:58 a.m., Inspector Miller received the following e-mail message from Jeffery Grubbs:

Subject: Re: Looking forword [sic] to dilivery [sic] No need for extra cost of expres [sic] shiping [sic] if you could send right away would be gratefull [sic] will be looking forword [sic] to it. Have next order in mind allredy [sic]. You will hear from me soon thanks. JT.

47. On March 26, 2002, at 11:46 p.m., Inspector Miller received the following e-mail message from Jeffery Grubbs:

Subject: Re: Lookingforword [sic] to dilivery [sic] Have not reseved [sic] order yet hope you have right addres [sic] 1199 park tarrace [sic] dr. Galt CA 95632 still looking forword [sic] to dilivery [sic] thanks JTWainscott

48. On March 29, 2002, at 4:46 p.m., Inspector Miller sent the following e-mail message to Jeffery Grubbs:

Subject: Re: Looking forword [sic] to dilivery [sic] Sorry, I have a major injury . . . . now surgery . . . : (I haven't forgotten you! will not disappoint you! Please forgive . . . this wasn't my choice! J.E.

49. On April 5, 2002, at 7:31 p.m., Inspector Miller received the following e-mail message from Jeffery Grubbs:

Subject: Re: Looking forword [sic] to dilivery [sic]

hopeing [sic] you had time to send please let me know JT

50. On February 7, 2002, I was informed by U.S. Postal Service Supervisor Robbin Kent of the Galt, CA, post office that Jeffery Grubbs was currently receiving mail delivery at 1199 Park Terrace Drive, Galt, CA 95632.

51. On March 28, 2002, I reviewed data compiled upon request by this agency from AutoTrack XP, Database Technologies, Inc., Boca Raton, Fl. AutoTrack XP is a public access information search system available through the Internet. AutoTrack XP records show Jeffery Grubbs, Social Security No. 573-45-8976, is most recently associated with the address of 1199 Park Terrace Dr , Galt, CA 95632. LexisNexis, also a public access information search system, lists Jeffery Grubbs at 1199 Park Terrace Drive, Galt, CA 95632. LexisNexis also associates the telephone number 209-745-5820 with Jeffery Grubbs at 1199 Park Terrace Drive, Galt, CA 95632 .

52. On March 29, 2002 I reviewed California Department of Motor Vehicles (DMV) records and determined that Jeffery Grubbs is listed as holding vehicle operator license, C2754695 and has a listed address of 1199 Park Terrace Drive, Galt, CA 95632.

53. On April 9, 2002, I was informed by Mark Coryell, of the California State Employment Development Division that state payroll tax withholding records reflect Jeffery Grubbs, with a date of birth of August 20, 1963, and California DMV operators number of C2754695, residing at 1199 Park Terrace Drive, Galt, CA 95632, with a listed telephone number of 209-745-5820. These facts are consistent with information

previously obtained from LexisNexis, AutoTrack XP, and California DMV.

54. On April 12, 2002, I was informed by Pacific Bell that the current telephone line for 1199 Park Terrace Drive, Galt, CA is 209-745-5820 and is listed to Jeffery Grubbs.

55. On April 12, 2002, I was provided information from WEBTV.com regarding the e-mail account associated with the e-mail address of JTWAINSCOTT @webtv.com. This information was provided pursuant to a federal grand jury subpoena served on WEBTV.com on April 10, 2002. WEBTV.com disclosed that the current billing name and address for the JTWAINSCOTT@webtv.com account is listed as Jeffery Grubbs, 1199 Park Terrace Dr., Galt, CA 95632. Additionally the subpoenaed information lists an account/ANI telephone number of 209-745-5820. An ANI telephone number is the telephone line from which the WEBTV receiver is dialing from in order to access the internet.

56. The videotape requested by Jeffery Grubbs entitled "Lolita Mother and Daughter" contains child pornography (sexually explicit conduct as defined in Title 18, United States Code, Section 2256(2)). I have reviewed the videotape. It is approximately ten minutes and thirty seconds in length, in its entirety. It depicts a nude juvenile female, approximately 10 to 13 years of age, engaged in sexually explicit conduct with a nude adult female appearing to be approximately 20 to 30 years of age. This activity includes the lascivious exhibition of the minor female's genitals, digital penetration of the minor's vagina and anus by the adult female, oral-genital contact by both the adult and minor

female, and penetration of the minor female by a foreign object.

57. During the daytime or early evening hours, on or about April 18, 2002, an attempt will be made by Postal Inspectors to deliver a package containing a videotape entitled "Lolita Mother and Daughter," and previously referred to in paragraphs 29, 30 and 56 of this Affidavit. The videotapes will contain visual images of minors engaged in sexually explicit activity, as defined in Title 18, United States Code, Section 2256.

58. To prepare this videotape for mailing to Jeffery Grubbs, I scratched my initials "GW" and the date "4-9-02" into the plastic of the videotape cartridge under the retractable protective edge covering the magnetic tape. Affixed to the videotape is a label on which is handwritten, "Lolita Mother and Daughter." I placed the videotape cartridge within a cardboard videotape cassette sleeve printed with the words "SONY 6 hrs (EP) Premium Grade T-120 VHS." I then placed the videotape and sleeve inside a mailing envelope addressed to "Jeff Grubbs, 1199 Park Terrace Drive, Galt, CA 95632," with a return address of J. E., P.O. Box 1353, Huron, SD 57350. The package has a standard first class U.S. Postal Service postage meter strip and postmark for Huron, SD.

59. I and/or other postal inspectors pre-positioned at 1199 Park Terrace Drive, Galt, CA 95632 will keep the package under surveillance. Surveillance of the package will continue as the package is accepted by person(s) presenting themselves as the authorized recipients of correspondence and other items addressed or destined for delivery to 1199 Park Terrace Drive, Galt, CA 95632.

60. Surveillance of the package and person(s) accepting custody of the package will continue until such times as the package is taken into the residence located at 1199 Park Terrace Drive, Galt, CA 95632. If no one accepts the package at this address, on or about April 18, 2002, additional attempts will be made on each successive day (not including Sunday) until the final date for which the Magistrate Judge authorizes execution of this search warrant.

61. Execution of this search warrant will not occur unless and until the parcel has been received by a person(s) and has been physically taken into the residence located at 1199 Park Terrace Drive, Galt, CA 95632. At that time, and not before, this search warrant will be executed by me and other United States Postal inspectors, with appropriate assistance from other law enforcement officers in accordance with this warrant's command.

62. Based upon the foregoing facts, I respectfully submit there exists probable cause to believe that the items set forth in Attachment B to this affidavit and the search warrant, will be found in the premises located at 1199 Park Terrace Drive, Galt, CA 95632, which residence is further described at Attachment A. Your affiant requests authority to seize such items, as listed herein and in Attachment B, and, after searching, return all non-relevant materials (or copies thereof when not practical to return the original) within a 120 day period of time.

63. Additionally, based on my training and experience, and based upon the training and experience of other law enforcement officers with whom I have spoken, I have learned that persons committing crimes such as those described above will retain fruits, evi-

dence, and instrumentalities of their crime at their residence, on their person (such as film, video, and pictures), and located in their vehicle for extended periods of time.

64. Wherefore, I respectfully request that a warrant be issued authorizing the United States Postal Inspection Service, with appropriate assistance from other law enforcement officers, to enter the said premises and therein search for and seize the items set forth in this Affidavit.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Gary R. Welsh
GARY R. WELSH
Postal Inspector

Approved as to form by:

/s/ Camil A. Skipper
CAMIL A. SKIPPER
Assistant U.S. Attorney

Subscribed to and sworn to
before me this 17th day of
April, 2002:

/s/ John F. Moulds
HON. JOHN F. MOULDS
United States Magistrate Judge

ATTACHMENT A

DESCRIPTION OF PROPERTY TO BE SEARCHED

The premises known as 1199 Park Terrace Drive, Galt, CA is a two-story house located on the east side Park Terrace Drive. The front of the structure faces west and is a corner house on the intersection of Park Terrace Drive and CA State Route 104. The house is gray with white trim. Facing the property from Park Terrace Drive, there is a large tree to the immediate right (south) of the driveway. A lawn and large shrubs generally separate the front of the house with the sidewalk and street to the west. To the north, a large red masonry wall separates the property from State Route 104. All the windows, both first and second floor, that face Park Terrace Drive are multi-paned windows trimmed in white. The structure's tri-level roof is constructed of Spanish tile. The attached two-car garage is set forward of the a main dwelling on the south side of the house and has white paneled roll-up door. The front door is white and is set up underneath an overhanging porch. The numbers "1199" made of a brass.-appearing material area affixed just to the upper left of the garage door.

ATTACHMENT B

LIST OF ITEMS TO BE SEIZED

1. VHS Videotape entitled "Lolita Mother and Daughter" with the initials "GW' and the date "4-9-02."

2. Cardboard videotape cassette sleeve printed bearing "SONY 6 hrs (EP) Premium Grade T-120 VHS."

3. U.S. Postal Service cardboard mailing container addressed to Jeff Grubbs, 1199 Park Terrace Drive, Galt, CA 95632,"with a return address of J. E., P.O. Box 1353, Huron, SD 57350, and packing paper originally contained within.

4. Any and all Web TV systems and components, including but not limited to, receiver boxes, keyboards, cables, monitors, instruction manuals, and storage containers.

5. Any and all records, documents or materials, including correspondence pertaining to the possession or receipt of visual depictions of minors engaged in sexually explicit conduct, as defined in Title 18, United States Code, Section 2256(2).

6. Any and all books and magazines containing visual depictions of minors engaged in sexually explicit conduct, as defined in Title 18, United States Code, Section 2256(2).

7. All originals and all copies and all negatives of visual depictions of minors engaged in sexually explicit conduct, as defined in Title 18, United States Code, Section 2256(2).

8. Any and all motion picture films and video cassettes of visual depictions of minors engaged in sexually explicit conduct, as defined in Title 18, United States

Code, Section 2256(2), or video recordings which are of or pertain to sexually explicit images of minors or child pornography even if self produced.

9. Any and all records; documents or materials including envelopes, letters, and other correspondence offering to transmit through interstate commerce including by United States Mails or by computer, any visual depictions of minors engaged in sexually explicit conduct, as defined in Title 18 United States Code, Section 2256(2).

10. Any and all records documents or materials including any and all envelopes, letters, and other correspondence identifying persons transmitting, through interstate commerce including by United States Mails or by computer, any visual depiction of minors engaged in sexually explicit conduct, as defined in Title 18, United States Code, Section 2256(2).

11. Any and all records documents or materials including any and all books, ledgers, and records relating to the production, reproduction receipt, shipment, orders, requests, trades, purchases, of transactions of any kind involving the transmission through interstate commerce including by United States Mails or by computer, any visual depiction of minors engaged in sexually explicit conduct, as defined by Title 18,United States Code, Section 2256(2).

12. Any and all records documents or materials including any and all address books, mailing lists, supplier lists, mailing address labels, computer password documentation, and any and all documents and records pertaining to the preparation., purchase, and acquisition of names or lists of names to be used in connection with the purchase, sale, trade, or transmission, through

interstate commerce including by United states Mail or by computer, any visual depiction of minors engaged in sexually explicit conduct, as defined in Title 18, United States code, Section 2256(2).

13. Any and all records documents or materials including any and all address books, names and list of names and addresses of minors visually depicted while engaged in sexually explicit conduct, as defined in Title 18, United States Code, Section 2256(2).

14. Any and all records, documents or materials including any and all materials and photographs depicting sexual conduct, whether involving minors or between adults and minors.

15. Any and all records, documents or materials pertaining to an interest in child pornography or sexually explicit images of minors.

16. Any and all undeveloped or processed film.

APPENDIX G

Fed. R. Crim. P. 41: Search and Seizure

(a) Scope and Definitions.

(1) Scope. This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.

(2) Definitions. The following definitions apply under this rule:

(A) "Property" includes documents, books, papers, any other tangible objects, and information.

(B) "Daytime" means the hours between 6:00 a.m. and 10:00 p.m. according to local time.

(C) "Federal law enforcement officer" means a government agent (other than an attorney for the government) who is engaged in enforcing the criminal laws and is within any category of officers authorized by the Attorney General to request a search warrant.

(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge with authority in the district—or if none is reasonably available, a judge of a state court of record in the district—has authority to issue a warrant to search for and seize a person or property located within the district;

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property

is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed; and

(3) a magistrate judge—in an investigation of domestic terrorism or international terrorism (as defined in 18 U.S.C. § 2331)—having authority in any district in which activities related to the terrorism may have occurred, may issue a warrant for a person or property within or outside that district.

(c) Persons or Property Subject to Search or Seizure. A warrant may be issued for any of the following:

(1) evidence of a crime;

(2) contraband, fruits of crime, or other items illegally possessed;

(3) property designed for use, intended for use, or used in committing a crime; or

(4) a person to be arrested or a person who is unlawfully restrained.

(d) Obtaining a Warrant.

(1) Probable Cause. After receiving an affidavit or other information, a magistrate judge or a judge of a state court of record must issue the warrant if there is probable cause to search for and seize a person or property under Rule 41(c).

(2) Requesting a Warrant in the Presence of a Judge.

(A) Warrant on an Affidavit. When a federal law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to

appear personally and may examine under oath the affiant and any witness the affiant produces.

(B) Warrant on Sworn Testimony. The judge may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony if doing so is reasonable under the circumstances.

(C) Recording Testimony. Testimony taken in support of a warrant must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit.

(3) Requesting a Warrant by Telephonic or Other Means.

(A) In General. A magistrate judge may issue a warrant based on information communicated by telephone or other appropriate means, including facsimile transmission.

(B) Recording Testimony. Upon learning that an applicant is requesting a warrant, a magistrate judge must:

(i) place under oath the applicant and any person on whose testimony the application is based; and

(ii) make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing.

(C) Certifying Testimony. The magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's accuracy, and file a copy of the record and

the transcription with the clerk. Any written verbatim record must be signed by the magistrate judge and filed with the clerk.

(D) Suppression Limited. Absent a finding of bad faith, evidence obtained from a warrant issued under Rule 41(d)(3)(A) is not subject to suppression on the ground that issuing the warrant in that manner was unreasonable under the circumstances.

(e) Issuing the Warrant.

(1) In General. The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it.

(2) Contents of the Warrant. The warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

(A) execute the warrant within a specified time no longer than 10 days;

(B) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and

(C) return the warrant to the magistrate judge designated in the warrant.

(3) Warrant by Telephonic or Other Means. If a magistrate judge decides to proceed under Rule 41(d)(3)(A), the following additional procedures apply:

(A) Preparing a Proposed Duplicate Original Warrant. The applicant must prepare a "proposed duplicate original warrant" and must read

or otherwise transmit the contents of that document verbatim to the magistrate judge.

(B) Preparing an Original Warrant. The magistrate judge must enter the contents of the proposed duplicate original warrant into an original warrant.

(C) Modifications. The magistrate judge may direct the applicant to modify the proposed duplicate original warrant. In that case, the judge must also modify the original warrant.

(D) Signing the Original Warrant and the Duplicate Original Warrant. Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact time it is issued, and direct the applicant to sign the judge's name on the duplicate original warrant.

(f) Executing and Returning the Warrant.

(1) Noting the Time. The officer executing the warrant must enter on its face the exact date and time it is executed.

(2) Inventory. An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person.

(3) Receipt. The officer executing the warrant must:

(A) give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or

(B) leave a copy of the warrant and receipt at the place where the officer took the property.

(4) Return. The officer executing the warrant must promptly return it—together with a copy of the inventory—to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(g) Motion to Return Property. A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

(h) Motion to Suppress. A defendant may move to suppress evidence in the court where the trial will occur, as Rule 12 provides.

(i) Forwarding Papers to the Clerk. The magistrate judge to whom the warrant is returned must attach to the warrant a copy of the return, of the inventory, and of all other related papers and must deliver them to the clerk in the district where the property was seized.

No. 04-1414

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, *Petitioner*,

v.

JEFFREY GRUBBS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a facially invalid anticipatory search warrant may be rendered valid by information contained in an affidavit that is not presented to the persons whose property is to be searched?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 04-1414

UNITED STATES OF AMERICA, *Petitioner*,

v.

JEFFREY GRUBBS

Respondent, Jeffrey Grubbs, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the lower court's opinion in this case.[1]

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Respondent has no objection to the background facts in the petition, with the following supplement:

The district court found that thirty minutes transpired after Mr. Grubbs was detained by the officers and after his premises were searched, before the defective search warrant was placed on the table where Grubbs was detained by the officers. App. 31a-32a; 41a. The district court found that this was a violation of Fed.R. Crim. P. 41(d). App. 42a. However, the district court found that Mr. Grubbs had never specifically asked to see the warrant, and therefore the Rule

[1] Respondent has no objection to Petitioner's jurisdictional statement.

41(d) violation was a "technical" one not requiring suppression because the officers did not "deliberately disregard" Rule 41(d). App. 42a-44a. The Ninth Circuit did not reach this issue because of its resolution of the principal question in the case. App. 4a.

REASONS FOR DENYING THE PETITION

The cases cited by petitioner as in conflict with the decision herein predate this Court's opinion in Groh v. Ramirez, 540 U.S. 551 (2004). Insufficient time has passed since Groh for any real conflict among the circuits to develop, making this Court's intervention unnecessary at this time. Moreover, the Grubbs opinion does not create any significant problems in the administration of the criminal justice system. Finally, the opinion correctly reflects the governing jurisprudence.

I. The Asserted Inter-Circuit Conflict Will Likely Resolve Itself As Courts Reconsider Their Precedents in Light of *Groh v. Ramirez*.

Petitioner's claim of inter-circuit conflict ignores the fact that the cases cited as being in conflict with the Ninth Circuit's opinion in this case predate this Court's decision in Groh v. Ramirez, 540 U.S. 551 (2004), upon which the Ninth Circuit relied. Circuit uniformity will likely be reached as these decisions are reconsidered by the issuing courts in light of Groh.

In Groh, this Court held that a warrant defective on its face cannot be cured by an affidavit that neither was incorporated into the warrant nor accompanied it. The Court recognized that one purpose of the particularity requirement is that "[a] particular warrant also 'assures the individual whose property is searched of the lawful authority of the executing officer, his need to search, and the limits of his power to search.'" Groh, 540 U.S. at 561 (quoting United States v. Chadwick, 433 U.S. 1, 9 (1977)). The Court acknowledged that "most Courts of Appeal have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the

supporting document accompanies the warrant." 540 U.S. at 557-58 (citing, *inter alia*, the Ninth Circuit's decision in United States v. McGrew, 122 F.3d 847, 849-50 (1997), the forerunner of the decision in the present case). The Groh court concluded that the incorporation doctrine was irrelevant because "in this case the warrant did not incorporate other documents by reference, nor did either the affidavit or the application (which had been placed under seal) accompany the warrant." Id., at 558.

All the cases cited by petitioner to frame an inter-circuit conflict pre-date the Groh decision. They appear to have limited validity because of their inconsistency with Groh's treatment of curing a warrant defect by specific incorporation of an accompanying affidavit. First, in four of the cases cited by petitioner, the affidavit was not incorporated into the warrant. United States v. Rey, 923 F.2d 1217 (6th Cir. 1991); United States v. Tagbering, 985 F.2d 946 (8th Cir. 1993); United States v. Moetamedi, 46 F.3d 225 (2d Cir. 1995); United States v. Hugoboom, 112 F.3d 1081 (10th Cir. 1997).[2] Second, in four of the cited cases, the affidavit was not attached to and did not accompany the warrant. United States v. Rey, supra; United States v. Moetamedi, supra; United States v. Hugoboom, supra; United States v. Dennis, supra.[3] Thus, all of these decisions must be reconsidered by the issuing courts in light of this Court's subsequent decision in Groh. Upon reconsideration, it is likely that any perceived inter-circuit conflict will resolve itself.

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[2]In the fifth case, United States v. Dennis, 115 F.3d 524 (7th Cir. 1997), "[t]he face of the warrant stated the execution of the warrant was subject to the conditions stated in the affidavit." Id., at 529.

[3]In the fifth case, United States v. Tagbering, supra, "the affidavit . . . was attached to the copies of the warrant the officers brought with them when they conducted the search." 985 F.2d at 950.

For example, in Baranski v. Fifteen Unknown Agents of the Bureau of Alcohol, Tobacco & Firearms, 401 F.3d 419 (6th Cir. 2005), the Sixth Circuit relied upon Groh to hold that a warrant lacking in particularity could not be cured by the supporting affidavit when the affidavit did not accompany the warrant:

> The particulars had to be communicated to the manager of Pars [the business to be searched] through the warrant or an attachment to the warrant. It is undisputed that they were not because as in Groh, the affidavit that contained the particulars did not accompany the warrant at the time of the search and seizure.

401 F.3d at 429. It is likely that other circuits, including those cited by petitioner, will join the Sixth and the Ninth in this interpretation of Groh.

Thus, the issue presented by petitioner is not ripe, and intervention by this Court would be premature.

II. THE CLAIMED RECURRING IMPORTANCE OF THE ISSUE PRESENTED IS EXAGGERATED

Petitioner overstates the recurring importance of the issue presented to the administration of the criminal justice system. First, the Ninth Circuit's decision enunciates a bright-line rule that law enforcement agencies and judicial officers can easily follow: in the case of an anticipatory search warrant, the triggering event must be set forth in the warrant itself, or in an affidavit that is incorporated by reference into the warrant and that will be attached and accompany the officers when the warrant is executed.[4]

Second, making law enforcement agencies aware of the rule, Pet. 21-22, is no more

---

[4]Petitioner's claimed concern about this rule on the basis that "search warrants must often be prepared in haste," Pet. 22, is misplaced in the case of anticipatory search warrants which, by their nature, generally allow ample time for preparation.

difficult than with any other rule of law. Indeed, it is actually less difficult because of the bright-line nature of the rule and the ease of compliance with it.

Finally, the very simplicity of the rule and the ease of compliance ensures that it will not "create an incentive to avoid use of anticipatory warrants." Pet. 21. Thus, there is no reason to believe that, in response to the rule, law enforcement officers will "'simply conduct the search (justified by "exigent circumstances") without any warrant at all.'" Id.

III. THE LOWER COURT CORRECTLY CONCLUDED THAT WHEN, AS HERE, THE WARRANT IS FACIALLY INVALID AND THE CURATIVE AFFIDAVIT IS NOT PRESENTED TO THE RESIDENTS, THE EVIDENCE MUST BE SUPPRESSED.

The Ninth Circuit correctly held that an invalid warrant cannot be cured by an affidavit that does not accompany the warrant. A search warrant "serves a high function." McDonald v. United States, 355 U.S. 451, 455 (1948). It interposes between the police and the public a neutral magistrate, who weighs the needs of law enforcement against a citizen's right of privacy. Id. By requiring issuance of a warrant only on a proper showing of probable cause, the Fourth Amendment guards not only against general searches, it also "assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and *the limits of his power to search*." United States v. Chadwick, 433 U.S. 1, 9 (1977) (emphasis added). In this case, Inspector Welsh drafted a warrant that was plainly invalid on its face. It stated that the affidavit established probable cause that the videotape "is now concealed" at Mr. Grubbs' house, App. 47a, when in fact, the affidavit stated that inspectors would attempt to deliver the videotape the next day, App.71a, and assured that the warrant would not be executed until the videotape "has been received by a person(s)" at the house "and has been physically taken into the residence." App. 57a, 72a. While the word "ANTICIPATORY" was hand-written at the top of the warrant above the words "SEARCH WARRANT," the warrant did not specify the acceptance of the videotape as the event authorizing execution; it therefore could not "assure[]" Mr. Grubbs "of "the limits of [Welch's] power to search." And because the affidavit was not presented to Mr. Grubbs, it could not cure that defect in the warrant.

Petitioner does not dispute that the warrant itself failed to set forth the triggering event.

See Pet. 11. Instead, it argues that the particularity requirement of the Fourth Amendment requires that only the place to be searched and the persons or things to be seized need be described in the warrant, not the conditions precedent to an anticipatory search warrant. Pet. 10.[5] But factors other than those specifically listed in the Fourth Amendment's text must appear on the face of the warrant for it to be constitutionally valid.

For example, a warrant is constitutionally invalid if it is not signed by a "neutral and detached" magistrate. Coolidge v. New Hampshire, 403 U.S. 443 (1971). In Coolidge, the state attorney general, who was authorized by state law to issue search warrants in his capacity as a justice of the peace, issued a search warrant for the defendant's car in the course of a murder investigation of which he had taken personal charge and for which he later served as chief prosecutor at trial. While nothing in the text of the Fourth Amendment requires that a search warrant be signed by a magistrate, much less a "neutral and detached" magistrate, the Court nonetheless relied on the "the policy underlying the warrant requirement of the Fourth Amendment" to hold that the search warrant was constitutionally invalid. 403 U.S. at 449. It explained:

> We find no escape from the conclusion that the seizure and search of the Pontiac automobile cannot *constitutionally* rest upon the warrant issued by the state official who was the chief investigator and prosecutor in this case. Since he was not the neutral and detached magistrate *required by the Constitution*, the search

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[5] Petitioner contends that the fact that the Fourth Amendment does not require warrants to describe with particularity "when the search may first take place" is "telling evidence that those who framed and ratified the Bill of Rights did not believe that advising a person of that fact" was as important as advising him of what property may be searched and what things may be seized. Pet. 12. But anticipatory search warrants are of relatively recent vintage and were unknown to those who framed and ratified the Bill of Rights, see United States v. Bingham, 270 F. Supp. 2d 665, 668 (W.D. Penn. 2003) (citing Fed. R. Crim. P. Rule 41, Advisory Comm. Notes 1990 Amendments), so it is unsurprising that the Fourth Amendment text does not address the issue.

stands on no firmer ground than if there had been no warrant at all.

403 U.S. at 453 (emphasis added).

Similarly, a search warrant is constitutionally invalid if it does not contain a termination date. United States v. Bailey, 628 F.2d 938 (6th Cir. 1980). In Bailey, the government obtained a search warrant to install a "beeper" in a drum of chemicals that could be used to manufacture PCP, but the warrant contained no time limitations.[6] Relying on Berger v. New York, 388 U.S. 41 (1967), which invalidated a statute that permitted an initial two-month surveillance period based on a single showing of probable cause and further extensions beyond the two months without a new showing, and United States v. Lamonge, 458 F.2d 197 (6th Cir. 1972), which held invalid an undated order purporting to authorize wiretapping for a period of eight days "from the date of this order," the court in Bailey held that a warrant that places no time limit on the search or seizure it purports to authorize is invalid. The court explained, "In our view, the issuance of a search warrant without a termination date seriously undermines the very fourth amendment interests the search warrant requirement is designed to protect." 628 F.2d at 946.

Thus, petitioner's argument that the Ninth Circuit is "add[ing] a fifth requirement" to the Warrant Clause is off target. Pet. 10. Just as the courts did in Coolidge and Bailey, the Ninth Circuit is simply enforcing the fourth amendment interests the warrant requirement is designed to protect in the modern context of anticipatory warrants.

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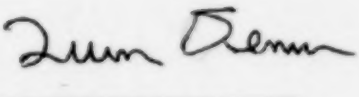
[6] A "beeper" is a small radio transmitter that broadcasts a signal. 628 F.2d at 938 n.1.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Dated: June 20, 2005

Respectfully submitted,



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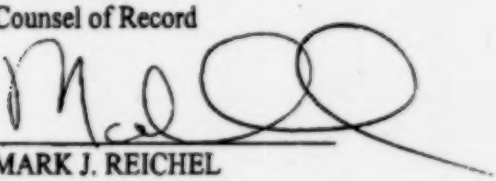

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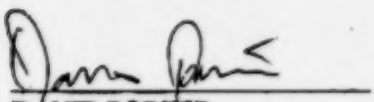

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No. 04-1414

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

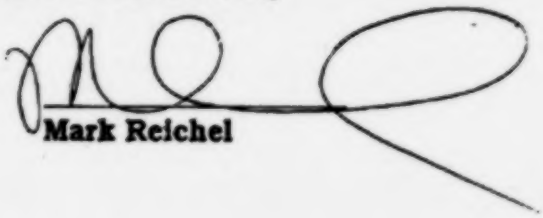
v.

JEFFREY GRUBBS,
Respondent.

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the Respondent's Brief in Opposition via e-mail and Federal Express, this 20th day of June, 2005.

[See Attached Service List]



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UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY GRUBBS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 04-1414

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JEFFREY GRUBBS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

As the petition demonstrates (at 15-20), there is a five-to-one circuit conflict, acknowledged by courts on both sides of the issue, on the question presented here —whether suppression is required when a search is conducted under an anticipatory warrant *after* the triggering condition is satisfied, but the triggering condition is not described either in the warrant or in a supporting affidavit that is both incorporated into the warrant and presented to the person whose property is being searched. Respondent does not deny the existence of the conflict. Instead, he contends (Br. in Opp. 3-5) that the conflict need not be resolved. He also contends that the decision below is correct (*id.* at 7-9) and that the government overstates the importance of

the question presented (*id.* at 5-6). Each of these contentions is mistaken.

A. *Groh* v. *Ramirez* Will Have No Effect On The Circuit Conflict

1. Respondent contends (Br. in Opp. 3-5) that it would be premature to resolve the circuit conflict. He argues that the lower courts should be given an opportunity to consider the effect on the question presented here of *Groh* v. *Ramirez*, 540 U.S. 551 (2004), which he characterizes as holding that "a warrant defective on its face cannot be cured by an affidavit that neither was incorporated into the warrant nor accompanied it" (Br. in Opp. 3). The cases on which the government relies, according to respondent, "have limited validity," because of their "inconsistency with *Groh*'s treatment of curing a warrant defect by specific incorporation of an accompanying affidavit." *Id.* at 4.

Respondent misperceives the issue in this case. The question presented is not, as respondent frames it, "[w]hether a facially invalid anticipatory search warrant may be rendered valid by information contained in an affidavit that is not presented to the persons whose property is to be searched." Br. in Opp. i. The question is not one of curing a concededly invalid warrant, but whether an anticipatory search warrant *is in fact* facially invalid in the first place solely because it does not specify the triggering event.

Respondent likewise misperceives the nature of the circuit conflict. The decisions of the Second, Sixth, Seventh, Eighth, and Tenth Circuits cited in the petition (at 15-18) did not hold that the warrant at issue was invalid but cured, much less that it was invalid but cured for a reason rejected in *Groh*. The decisions held, correctly, that an anticipatory warrant is *not* invalid

merely because it does not specify the triggering event.[1] In those five circuits, the Fourth Amendment has been interpreted to require only that the triggering event be described in the supporting affidavit presented to the magistrate judge and that the warrant be executed after the triggering event occurs. See Pet. 15-18. Since those circuits hold that a warrant like the one at issue here is *not* invalid, *Groh*'s discussion of what is necessary to cure a warrant that *is* invalid has no relevance to their holdings.[2]

---

[1] See *United States* v. *Dennis*, 115 F.3d 524, 529 (7th Cir. 1997) (rejecting argument that "the anticipatory warrant issued in this case is invalid because it failed to list [all] conditions [precedent to execution] on its face"); *United States* v. *Moetamedi*, 46 F.3d 225, 229 (2d Cir. 1995) ("an anticipatory warrant is valid even though it does not state on its face the conditions precedent for its execution"); *United States* v. *Tagbering*, 985 F.2d 946, 950 (8th Cir. 1993) (rejecting argument that "the warrant was invalid because it did not expressly condition the search upon the controlled delivery"); *United States* v. *Rey*, 923 F.2d 1217, 1221 (6th Cir. 1991) ("the warrant was not defective because it did not expressly specify that the search could be executed only after the controlled delivery had been made").

[2] Respondent quotes *Groh*'s observation that "most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." Br. in Opp. 3-4 (quoting 540 U.S. at 557-558). Respondent then notes (*id.* at 4) that the Court cited, for that proposition, the Ninth Circuit's decision in *United States* v. *McGrew*, 122 F.3d 847 (1997). But the Court cited decisions of the Sixth, Eighth, and Tenth Circuits as well, 540 U.S. at 558, and each of those circuits has also held that an anticipatory warrant is not invalid merely because it fails to include the triggering condition, see Pet. 15-18. That this Court relied upon the law in those circuits is further confirmation that *Groh* will not occasion a "reconsideration" (Br. in Opp. 4) by the courts that have rejected the Ninth Circuit's unique rule for anticipatory warrants.

2. *Groh* also provides no support for the Ninth Circuit's rule that an anticipatory warrant is facially invalid if it does not describe the triggering event. The warrant in *Groh* was held to be facially invalid because it omitted information "unambiguously" required by the Fourth Amendment: a particular description of the "things to be seized." 540 U.S. at 557 (quoting U.S. Const. Amend. IV). No such claim could be made about the warrant here. See Pet. App. 49a-51a (listing 16 categories of "items to be seized"). And while the decision below "relied" on *Groh* (Br. in Opp. 3), it did not (and could not) do so for the proposition that a triggering condition is subject to the Fourth Amendment's particularity requirement. See Pet. App. 10-12a, 14a-15a. The warrant in *Groh* was not anticipatory, and the Court did not address the requirements for an anticipatory warrant. Indeed, the Ninth Circuit explicitly acknowledged that "[t]he *Groh* Court considered a warrant that 'failed to identify any of the items' to be seized." *Id.* at 11a (quoting *Groh*, 540 U.S. at 554).[3]

If anything, *Groh* casts doubt on the Ninth Circuit's rule, because it recognizes that the Warrant Clause has "four[] requirement[s]," 540 U.S. at 557, and a requirement that the triggering condition be specified in the warrant is not one of them. Instead, as explained in the petition (at 10-11), the triggering condition implicates different requirements of the Fourth Amendment: the requirements that the warrant be based "upon probable

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[3] Like the one in *Groh*, the warrant in the Sixth Circuit case on which respondent relies (Br. in Opp. 5) was held to violate the Fourth Amendment's particularity requirement because it did not specify the items to be seized. See *Baranski* v. *Fifteen Unknown Agents of the Bureau of Alcohol, Tobacco & Firearms*, 401 F.3d 419, 428-431 (2005).

cause" and that it be "supported by Oath or affirmation." That is why a description of the triggering condition in the supporting affidavit and a finding by the magistrate judge that it supports probable cause are constitutionally sufficient.

B. The Ninth Circuit's Decision Is Incorrect

Respondent makes a number of arguments (Br. in Opp. 7-9) in defense of the Ninth Circuit's rule. Since the rule has been rejected by five circuits, however, his arguments would not provide a reason to deny certiorari even if they had merit. In any event, each argument lacks merit.

Respondent contends that anticipatory warrants "were unknown to those who framed and ratified the Bill of Rights," and that it is therefore "unsurprising that the Fourth Amendment [sic] text does not address the issue." Br. in Opp. 8 n.5. The Ninth Circuit's rule is correct, according to respondent, because it "enforc[es] the fourth amendment interests the warrant requirement is designed to protect in the modern context of anticipatory warrants." *Id.* at 9. Regardless of whether anticipatory warrants were used in the late eighteenth century, however, the general question of "when [a] search may first take place," *United States* v. *Hotal*, 143 F.3d 1223, 1227 (9th Cir. 1998), can hardly be said to have been "unknown" to the Founding generation (Br. in Opp. 8 n.5) or to have become relevant only in "modern" times (*id.* at 9). Yet those who framed and ratified the Fourth Amendment determined that it was only "the place to be searched" and "the persons or things to be seized" that must be described with particularity in a warrant. U.S. Const. Amend. IV.

Respondent argues that this Court has recognized that "factors other than those specifically listed in the

Fourth Amendment's text must appear on the face of the warrant for it to be constitutionally valid." Br. in Opp. 8. He cites *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), for the proposition that "a warrant is constitutionally invalid if it is not signed by a 'neutral and detached' magistrate." Br. in Opp. 8. But that is not the holding of the case. *Coolidge* holds that a search cannot be justified by a warrant if the warrant was "not *issued* by a 'neutral and detached magistrate.'" 403 U.S. at 449 (emphasis added). It does not hold that a warrant that *is* issued by a neutral and detached magistrate is nevertheless unconstitutional if the magistrate's signature does not "appear on the face of the warrant." Br. in Opp. 8. The requirement of a neutral and detached magistrate has nothing to do with the Fourth Amendment's particularity requirement. Rather, it emerges from the warrant requirement itself: "[i]nherent in the concept of a warrant is its issuance by a 'neutral and detached magistrate.'" *United States* v. *United States District Court*, 407 U.S. 297, 316 (1972). See also *Illinois* v. *Gates*, 462 U.S. 213, 240 (1983) ("The essential protection of the warrant requirement of the Fourth Amendment, as stated in *Johnson* v. *United States*, 333 U.S. 10 (1948), is in 'requiring that [the usual inferences which reasonable men draw from evidence] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Id.*, at 13-14."); *Shadwick* v. *City of Tampa*, 407 U.S. 345, 350 (1972).[4]

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[4] Respondent also cites the Sixth Circuit's decision in *United States* v. *Bailey*, 628 F.2d 938 (1980), for the proposition that "a search warrant is constitutionally invalid if it does not contain a termination date." Br. in Opp. 9. Like *Coolidge*, however, *Bailey*

Respondent also asserts that the warrant in this case was "invalid on its face" (Br. in Opp. 7) because it mistakenly stated that the property to be seized "is now concealed" in respondent's home (Pet. App. 47a). He then argues that the defect was not cured by the affidavit, because it was not presented to respondent at the time of the search, and that suppression was therefore required. Br. in Opp. 7. But the fact that the warrant stated that the property "is now concealed" at respondent's home, rather than that it "will be concealed" there when the triggering event occurs, does not render the warrant facially invalid. At most, that fact—in combination with the fact that the warrant authorized a search *from the date of issuance* until 10 days thereafter, without requiring that the search take place after the triggering event—makes the warrant overbroad as to time. See Pet. 13. As explained in the petition (at 13-15), suppression is not an appropriate remedy for that type of overbreadth when, as in this case, the search *in fact* occurred *after* the triggering event.

C. The Petition Does Not Overstate The Importance Of The Question Presented

Respondent contends that the petition "overstates the recurring importance of the issue presented to the administration of the criminal justice system." Br. in Opp. 5. He argues that suppression can be avoided in the Ninth Circuit if "law enforcement agencies [are made] aware of the rule" that "the triggering event

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was not based on the Fourth Amendment's particularity requirement. It held that monitoring the location of property with a beeper for "an indefinite period of time" violates the Fourth Amendment because it is "an unreasonable search." 628 F.2d at 945.

must be set forth in the warrant itself[] or in an affidavit that is incorporated by reference into the warrant and that [is] attached and accompan[ies] the officers when the warrant is executed." *Ibid.* That argument ignores the costs to the criminal justice system as a whole of a rule that creates incentives to rely on warrantless searches based on exigent circumstances, rather than searches pursuant to a warrant tailored to contingencies and justified to a magistrate. See Pet. 21. The argument also ignores the unavoidable costs of the Ninth Circuit's rule. The petition acknowledges (at 21) that the government could avoid suppression in some cases by training federal investigators and prosecutors to do what the Ninth Circuit requires. Nevertheless, the government pointed out, training at the federal level would not eliminate cases resulting in suppression; rather, there would still be a class of cases in which the government had to go to trial without the most probative evidence, agree to a guilty plea on terms highly favorable to the defendant, or, as is likely in this case, forgo prosecution entirely. Pet. 20-22.

The petition (at 21-22) identifies two reasons why suppression under the Ninth Circuit's rule could not be avoided altogether, and respondent offers no answer to either of them. First, federal prosecutions often result from state or local investigations, and there is no way to ensure that all of the state and local law enforcement agencies and prosecutor's offices in the Ninth Circuit will adhere to a rule that is not applicable in the courts where their cases are ordinarily brought. See Pet. 21-22. Second, despite their best efforts to comply with all requirements in what is already a complex area of law, investigators and prosecutors sometimes make mistakes when they apply for a search warrant, parti-

cularly since that process, even for anticipatory warrants, often occurs "in the midst and haste of a criminal investigation." *Gates*, 462 U.S. at 235 (quoting *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965)). It is one thing to suppress evidence when, as in *Groh*, an officer fails to comply with a clear and textually "unambiguous[]" requirement of the Fourth Amendment, 540 U.S. at 557; it is quite another to saddle the government with a rule that will sometimes result in suppression when the rule has no basis in the Constitution. See Pet. 22. For these reasons, the rule in the Ninth Circuit, where nearly one quarter of federal criminal cases are brought (see Pet. 20), does have "recurring importance * * * to the administration of the criminal justice system" (Br. in Opp. 5).

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JULY 2005

Supreme Court, U.S.
FILED
NOV 14 2005
OFFICE OF THE CLERK

(9)

No. 04-1414

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY GRUBBS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: APR. 21, 2005
CERTIORARI GRANTED: SEPT. 27, 2005

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 2:02-CR-00164-WBS-1

UNITED STATES OF AMERICA, PLAINTIFF

v.

JEFFEREY GRUBBS, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
04/19/2002	1	COMPLAINT by US Attorney naming Jefferey Grubbs (1) count(s) cmp, before Magistrate Judge John F. Moulds [2:02-m-84] (old) (Entered: 04/19/2002)
04/19/2002	2	MINUTES before Magistrate Judge John F. Moulds RE: initial appearance; dft present in custody; advised; first appearance of Jefferey Grubbs; FD Mark Joseph Reichel appointed; defense request detention hrg; detention hearing SET on 2:00 4/24/02 for Jefferey Grubbs; govt moves for detention; preliminary hrg to be set at next appearance;

DATE	DOCKET NUMBER	PROCEEDINGS
		C/R ECRO TAPE 1/1 [2:02-m-84] (old) (Entered: 04/22/2002)
		* * * * *
04/25/2002	6	INDICTMENT by US Attorney Camil Antoinette Skipper; Counts filed against Jefferey Grubbs (1) count 1 (mm1) (Entered: 04/25/2002)
05/03/2002	7	MINUTES before Magistrate Judge John F. Moulds RE: arraignment; dft Jefferey Grubbs arraigned; not guilty plea entered; Attorney Linda Harter present for Mark Reichel; status hearing SET for 9:00 5/8/02 for Jefferey Grubbs; Judge Shubb's excludable order given out in court; C/R none (old) (Entered: 05/06/2002)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
06/21/2002	16	NOTICE OF MOTION AND MOTION to suppress evidence and statements; by defendant Jefferey Grubbs; Memorandum of Points and authorities in support thereof; hearing SET for 9:00 8/7/02 before the Chief Judge William B Shubb (lm) (Entered: 06/24/2002)
	* * * * *	
09/17/2002	30	OPPOSITION by plaintiff USA to Motion to Suppress Evidence and Statements; by defendant Jefferey Grubbs [16-1] (lm) (Entered: 09/18/2002)
	* * * * *	
10/02/2002	32	REPLY by defendant Jefferey Grubbs to Motion to Suppress Evidence and statements; Memorandum of Points and authorities in support thereof by defendant Jefferey Grubbs [16-1] (lm) (Entered: 10/03/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
10/15/2002	33	MINUTES before Chief Judge William B Shubb RE: Evidentiary Hearing on dft's re motion to suppress evidence and statements by defendant Jefferey Grubbs [16-1] First day; Govt witness Patrick Esteban sworn and testified on direct; x-exam; re-direct; govt witness Gary Welsh sworn and testified on direct; x-exam; defense witness Carol Bradstreet sworn and testified on direct; x-exam; matter continued to 10/23/02 at 10:00; court adjourned C/R Kelly O'Halloran (lm) (Entered: 10/16/2002)
10/21/2002	34	BRIEF by defendant Jefferey Grubbs after hearing on Motion to Suppress Evidence and Statements [16-1] (lm) (Entered: 10/22/2002)
10/23/2002	35	MINUTES before Chief Judge William B Shubb; Further hearing on Motion to suppress evidence and statements; by defendant Jefferey Grubbs [16-1] HEARING CONTINUED to

DATE	DOCKET NUMBER	PROCEEDINGS
		9:00 11/6/02 C/R Kelly O'Halloran (lm) (Entered: 10/24/2002)
10/28/2002	36	RESPONSE by plaintiff United States to Defendant's Brief after hearing on Motion to Supress Evidence and Statements [34-1] (lm) (Entered: 10/29/2002)
10/28/2002	37	ATTACHMENT by plaintiff United States in SUPPORT of the Government's Response to Defendant's Brief after hearing on Motion to Suppress Evidence and Statemens [36-1] (lm) (Entered: 10/29/2002)
10/30/2002	38	ORIGINAL DECLARATION of US Postal Inspector Gary Welsh in SUPPORT of Government's Response to Dft's Brief after hearing on Motion to Suppress Evidence and Statements [36-1] (lm) (Entered: 10/31/2002)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
11/04/2002	40	TRANSCRIPT of 10/15/02 hearing on motion to suppress as to defendant Jefferey Grubbs by C/R Kelly O'Halloran (mdp) (Entered: 11/05/2002)
	* * * * *	
12/02/2002	47	TRANSCRIPT of 10/23/02 hearing on motion to suppress as to defendant Jefferey Grubbs by C/R K. O'Halloran (daw) (Entered: 12/03/2002)
12/02/2002	48	DEFENSE BRIEF by defendant Jefferey Grubbs outlining argument for suppression of evidence (daw) (Entered: 12/03/2002)
	* * * * *	
12/04/2002	50	MINUTES before Chief Judge William B. Shubb: closing argument on dft motion to suppress evidence and statements; by defendant Jefferey Grubbs [16-1] CONTINUED TO 9:00 12/11/02; dft present and on bail; appearances by Camil Skipper for govt and Mark Reishel AFD C/R K. O'Halloran (daw) (Entered: 12/05/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
12/11/2002	51	MINUTES before Chief Judge William B. Shubb court hears closing arguments on defendants motion to suppress evidence by defendant Jefferey Grubbs, then takes his motion under [16-1] SUBMISSION status hearing set for 9:00 1/8/03 for Jefferey Grubbs C/R Kelly O'Halloran (mdp) (Entered: 12/12/2002)
		* * * * *
01/15/2003	54	MINUTES before Chief Judge William B. Shubb; motion to suppress evidence and statements by defendant Jefferey Grubbs [16-1] DENIED; status hearing set for 9:00 1/22/03 for Jefferey Grubbs; C/R K Watkins (crf) (Entered: 01/16/2003)
01/16/2003	53	MEMORANDUM AND ORDER by Chief Judge William B. Shubb motion to suppress evidence and statements by defendant Jefferey Grubbs [16-

DATE	DOCKET NUMBER	PROCEEDINGS
		1] DENIED (cc: all counsel) (daw) (Entered: 01/16/2003)
		* * * * *
01/22/2003	56	NOTICE OF MOTION AND MOTION for Reconsideration of denial of Motion to Suppress evidence by defendant Jefferey Grubbs; Motion hearing set for 9:00 1/23/03 (mm1) (Entered: 01/23/2003)
01/29/2003	57	RESPONSE by plaintiff USA to motion for Reconsideration of denial of Motion to Suppress evidence by defendant Jefferey Grubbs [56-1] (daw) (Entered: 01/30/2003)
02/06/2003	58	REPLY by defendant Jefferey Grubbs to response to motion for Reconsideration of denial of Motion to Suppress evidence by defendant Jefferey Grubbs [56-1] (sk) (Entered: 02/07/2003)
02/12/2003	59	MINUTES before Chief Judge William B. Shubb: dft present and on bail; court hears oral argument on dft's motion for reconsideration; motion DENIED; court to issue order; change of plea hearing SET

DATE	DOCKET NUMBER	PROCEEDINGS
		for 9:00 2/27/03 for Jefferey Grubbs; appearances by Camil Skipper and Mark Reichel C/R K. O'Halloran (daw) (Entered: 02/13/2003)
02/13/2003	61	BRIEF by defendant Jefferey Grubbs following oral argument on motion for reconsideration (daw) (Entered: 02/14/2003)
02/14/2003	60	MEMORANDUM AND ORDER by Chief Judge William B. Shubb: motion for Reconsideration of denial of Motion to Suppress evidence by defendant Jefferey Grubbs [56-1] (cc: all counsel) (daw) (Entered: 02/14/2003)
		* * * * *
03/05/2003	66	MINUTES before Chief Judge William B Shubb Re: Change of Plea; Guilty plea entered by Jefferey Grubbs (1) count(s) 1 of the Indictment; Sentencing hearing SET for 9:00 5/14/03 for Jefferey Grubbs C/R Patricia Hernandez (lm) (Entered: 03/06/2003)

DATE	DOCKET NUMBER	PROCEEDINGS
03/17/2003	67	TRANSCRIPT of 3/5/03 as to defendant for change of plea hearing by C/R P Hernandez (ak) (Entered: 03/18/2003)
	* * * * *	
05/21/2003	70	MINUTES before Judge William B. Shubb sentencing Jefferey Grubbs (1) count(s) 1 to imprisonment of 33 mos; to surrender after conclusion of appeal; TSR 36 mos; Fine $3,700; S/A $100 due immediately; see J&C for special conditions; terminating defendant Jefferey Grubbs; case terminated; C/R Keli Rutherdale (crf) (Entered: 05/22/2003)
05/27/2003	71	NOTICE of Appeal to 9th Circuit by Dft Jefferey Grubbs Conviction and Sentence [70-1], and to Order denying Dft's Motion to Suppress Evidence[53-1] (fee status Not paid) (lm) (Entered: 05/28/2003)

DATE	DOCKET NUMBER	PROCEEDINGS
05/29/2003	72	JUDGMENT and Commitment issued as to Jefferey Grubbs by Judge William B. Shubb (daw) (Entered: 06/02/2003)
		* * * * *
06/10/2003	76	TRANSCRIPT of 1/15/03 hearing on Dft's Motion to Supress as to defendant Jefferey Grubbs by C/R Kimberly M Watkins (lm) (Entered: 06/11/2003)
		* * * * *
06/23/2003	82	TRANSCRIPT of 12/4/02 hrg on Further Hearing Re Motion to Suppress as to Dft Jefferey Grubbs by C/R Kelly O'Halloran (lm) (Entered: 06/24/2003)
06/23/2003	83	TRANSCRIPT of 12/11/02 hrg on Further Hearing re Motion to Suppress as to Dft Jefferey Grubbs by C/R Kelly O'Halloran (lm) (Entered: 06/24/2003)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
06/23/03	85	TRANSCRIPT of 2/12/03 hearing on Motion for Reconsideration as to Dft Jefferey Grubbs by C/R Kelly O'Halloran (lm) (Entered: 06/24/2003)
	* * * * *	
07/08/03	87	TRANSCRIPT of 5/21/03 hearing on Sentencing as to defendant Jefferey Grubbs by C/R Keli Rutherdale (lm) (Entered: 07/09/2003)
	* * * * *	
07/15/03	89	TRANSCRIPT of 05/03/02 hearing on Arraignment as to defendant Jefferey Grubbs by VDRP (sk) (Entered: 07/16/2003)
07/15/03	90	TRANSCRIPT of 04/19/02 hearing on Initial Appearance by ECRO (sk) (Entered: 07/21/2003)
	* * * * *	

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-10311

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JEFFEREY GRUBBS, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	PROCEEDINGS
6/13/03	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Filed in D.C. on 5/21/03; setting schedule as follows: transcript shall be ordered by 6/17/03 for Jefferey Grubbs; transcript shall be filed by 7/17/03; appellants' briefs, excerpts due by 8/26/03 for Jefferey Grubbs; appellees' brief due 9/25/03 for USA; appellants' reply brief due by 10/9/03 for Jefferey Grubbs. (RT required: y) (Sentence imp 33 months) [03-10311] (ft)
	* * * * *
9/11/03	Filed original and 15 copies aplt's opening brief of 35 pages and 5 excerpts of record in 2 volumes; served on 09/09/03. (Informal: No) [03- 10311] (dv)

DATE	PROCEEDINGS
	* * * * *
11/3/03	Filed original and 15 copies appellee USA's 27 page brief, 5 supplemental excerpts of record in 1 volume; served on 10/30/03. [03-10311] (je)
11/14/03	Filed original and 15 copies Jefferey Grubbs reply brief (Informal: n) 7 pages; served on 11/13/03. [03-10311] (je)
	* * * * *
2/2/04	FILED CERTIFIED RECORD ON APPEAL: 2 CLERK'S RECORDS & 1 REPORTER'S TRANSCRIPT. (ORIGINAL) [03-10311] (sd)
3/9/04	ARGUED AND SUBMITTED TO Betty B. FLETCHER, Stephen R. REINHARDT, Jane A. Restani [03-10311] (ah)
3/9/04	Received USA additional citations, served on 3/9/04. (panel) [03-10311] (ah)
7/26/04	FILED OPINION: REVERSED AND REMANDED (Terminated on the Merits after Oral Hearing; Reversed/Remanded; Written, Signed, Published. Betty B. FLETCHER; Stephen R. REINHARDT, author; Jane A. Restani.) FILED AND ENTERED JUDGMENT. [03-10311] (je)
	* * * * *

DATE	PROCEEDINGS
9/9/04	Filed original and 50 copies Appellee USA petition for panel rehearing and petition for rehearing en banc in 13 pages; served 9/8/04. [Panel and All Active Judges and Interested Senior Judges] [03-10311] (je)
	* * * * *
10/22/04	Filed Appellant Jefferey Grubbs's opposition and answer to Govt's pfr en banc in 15 pages; served 10/20/04. [Panel and All Active Judges and Interested Senior Judges] [03-10311] (je)
12/6/04	Filed order and amended opinion (Judges Betty B. FLETCHER, Stephen R. REINHARDT, Jane A. Restani) (Orig. opinion id:) The majority opinion filed July 26, 2004, slip op. 9965, and appearing at 377 F3d 1072 (9th Cir. 2004), is hereby amended as follows: 1. Last line on slip op. 9976 and continuing onto slip op. 9977: after "(a)," replace "is incorporated within the four corners of the warrant" with "is sufficiently incorporated into the warrant." With this amendment, the panel has voted to deny the petition for panel rehearing. Judge Reinhardt has voted to deny the petition for rehearing en banc, and Judge B. Fletcher and Judge Restani so recommended. The full court has been advised of

DATE	PROCEEDINGS
	the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 23. The petition for rehearing and the petition for rehearing en banc are DENIED. No further petitions for rehearing or petition for rehearing en banc shall be entertained. [03-10311] (je)
12/29/04	MANDATE ISSUED [03-10311] (je)

* * * * *

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CRS-02-0164 WBS

UNITED STATES OF AMERICA, PLAINTIFF

v.

JEFFERY HAYMEN GRUBBS, DEFENDANT

[Filed: Apr. 25, 2002]

VIOLATION: 18 U.S.C. §2252(a)(2)—Receipt of Visual Depliction of Minor Engaged in Sexually Explicit Conduct

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INDICTMENT

The Grand Jury charges: THAT

JEFFERY HAYMEN GRUBBS,

defendant herein, on or about April 19, 2002, in the County of Sacramento, State and Eastern District of California, did knowingly receive a visual depiction that had been mailed pursuant to his request, to wit: a videotape labeled "Lolita Mother and Daughter," the production of which involved the use of a minor engaged in sexually explicit conduct as defined in Title 18, United States Code, Section 2256(2), and which visual depictions were of such conduct.

All in violation of Title 18, United States Code, Section 2252(a)(2).

A TRUE BILL.

_____

FOREPERSON

/s/ JOHN K. VINCENT
JOHN K. VINCENT
United States Attorney

JOHN K. VINCENT
United States Attorney
CAMIL A. SKIPPER
Assistant U.S. Attorney
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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. Cr. S-02-164

UNITED STATES OF AMERICA, PLAINTIFF

v.

JEFFREY GRUBBS, DEFENDANT

REPORTER'S TRANSCRIPT

MOTION TO SUPPRESS

TUESDAY, OCTOBER 15, 2002

BEFORE THE HONORABLE WILLIAM B. SHUBB,
CHIEF JUDGE

Reported by: KELLY O'HALLORAN, CSR #6660

APPEARANCES

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Assistant Federal Defender

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[1]

SACRAMENTO, CALIFORNIA

TUESDAY, OCTOBER 15, 2002, 1:30 P.M.

THE CLERK: Calling criminal case 02-164; United States versus Jeffrey Grubbs. This is on for an evidentiary hearing on defendant's motion to suppress, your Honor.

THE COURT: Good afternoon.

MR. REICHEL: Good afternoon, your Honor.

MS. SKIPPER: Good afternoon, your Honor.

THE COURT: I'm sorry for the delay.

Is Mr. Grubbs present?

MR. REICHEL: Yes, he is, your Honor.

THE COURT: Why don't you have him sit at the counsel table.

Mr. Reichel, would you like to make a orief opening statement and explain to the Court what the evidence is that you intend to present today?

MR. REICHEL: Thank you, your Honor. To begin, the postal inspector that Ms. Skipper has to testify here today is Jeffrey (sic) Welsh. And Mr. Welsh also testified before the grand jury. I don't have his grand jury transcripts today, which I'm entitled to at a suppression motion under the Jencks Act and Rule 26.2. Ms. Skipper and I discussed

that, and what we propose to do is to have a hearing today anyway. And those were not prepared yet by the government. They don't prepare [2] them unless they're really ready to go to trial. His grand jury transcripts are not in her file. After today's hearing, I think by our agreement, those are going to be produced, and I'm going to look at them. If they materially affect the ruling to the Court or the questions that were asked, then I may come back to the Court. If not, I would just submit it them to the Court for the Court to review them prior to his decision.

THE COURT: How soon do you think the transcripts will be ready?

MS. SKIPPER: I intend to request those when I get back to my office this afternoon. And I imagine I can probably have them by the end of the week.

THE COURT: All right. So is Mr. Welsh the only witness?

MS. SKIPPER: No, your Honor. And that is Gary Welsh from the Postal Inspection Service. And I also have with me Patrick Esteban who is also a postal inspector. He did not testify before the grand jury, your Honor. He was present, though, at the execution of the search warrant.

THE COURT: All right. Those are the two witnesses then?

MR. REICHEL: Those are the two witnesses, your Honor.

THE COURT: Were you going to call the witnesses or was Ms. Skipper? I believe Ms. Skipper was going to call [3] them. I can if the Court would prefer.

THE COURT: Before you call your first witness then, Mr. Reichel, would you like to make an opening statement and tell me what it is you think the issue is that these witnesses will address?

MR. REICHEL: Yes, your Honor. Number one, that when, first of all, that the warrant on its face is a forthwith warrant. And although it's written in there anticipatory, there's nowhere in there that, on the face of the warrant, on the body of the warrant, which has the triggering event. And the case that's discussed in the government's pleading is a case of Hotal, H-o-t-a-l, I believe. And Hotal talks about and discusses that that can be cured. That is defective, but that can be cured with the affidavit having a reference to the triggering event. And specifically if all of the—it sounds like if all of the officers are aware of the triggering event and so forth, then that may be cured.

Additionally, I want to ask him about when Mr. Grubbs was approached outside of his residence, there was immediately a questioning and an answering that took place. I believe clearly he was in custody, and the questions that were asked by the inspectors were likely to illicit an incriminating response, and therefore it violates Miranda.

Additionally, in his declaration he talks about the officers entering the premises immediately prior to—I mean [4] prior to any discussions with

Mr. Grubbs about the location of the videotape and so forth in the form of, they term it, a safety sweep of the premises.

Additionally—

THE COURT: Well, is that the evidence you're trying to suppress?

MR. REICHEL: Yes, your Honor.

THE COURT: All right. Go over that again.

MR. REICHEL: There was an entry before the triggering event was known to have occurred to them, I believe.

THE COURT: I see. Okay. And the tape was found during that entry?

MR. REICHEL: I believe the tape—I don't know, your Honor.

THE COURT: Wouldn't that be important to your point?

MR. REICHEL: Yes. And I don't have that answer.

It's nowhere in anything I've been provided.

THE COURT: So you're going to question the witnesses on that?

MR. REICHEL: Yes, your Honor.

THE COURT: All right.

MR. REICHEL: Additionally, on the consent, they say they weren't allowed to—pursuant to the warrant, they were not allowed to seize the computer and some other items, and that they received a consent from Mr. Grubbs. And I'd like to [5] question them about the circumstances which surround that consent.

THE COURT: Is the computer evidence in the case?

MS. SKIPPER: No, your Honor. The evidence that was found in the computer would likely be relevant conduct under the guidelines. However, he is not charged with possession of any of those matters.

THE COURT: Does he have a right to bring this motion to suppress the matters from being heard by the Court in the event of a conviction at the time of sentencing?

MS. SKIPPER: I don't believe that's a suppression issue, your Honor. It is my understanding that that would be fought after the conviction and at the time of the Court's considering what is relevant conduct. Then the issue will become whether or not there was bad faith on the part of the agents that would preclude the Court from considering that as relevant conduct.

MR. REICHEL: Additionally, your Honor, if at a trial I believe that—I imagine they're going to attempt to introduce everything they found besides the videotape at a trial.

MS. SKIPPER: The government's brief specifically says that that is not the case. It's not relevant, your Honor, to the charge in the indictment.

THE COURT: That's what I thought.

[6]

Why don't you tell me now, Ms. Skipper, what the evidence is that the government intends to offer in the trial.

MS. SKIPPER: At trial, the government would offer the evidence leading up to the purchase of the videotape.

THE COURT: I'm sorry. The tangible evidence. What was found?

MS. SKIPPER: The videotape that was found in the residence.

THE COURT: Anything else resulting from the search?

MS. SKIPPER: No, your Honor, not at trial.

THE COURT: Just the videotape?

MS. SKIPPER: Yes, your Honor. He's charged with receipt. And that's the only thing that he received.

THE COURT: And do you think that you're going to be offering the evidence of the computer and what was in the computer perhaps under 404(b) or to impeach him or for any other purpose?

MS. SKIPPER: No, your Honor. I don't believe that's necessary.

THE COURT: All right.

MS. SKIPPER: It's a very straightforward case. The government would, however, put it forward at sentencing as relevant conduct.

THE COURT: Well, Mr. Reichel, if the government makes that representation and agrees to be bound by that [7] representation that they will not offer anything that was found in the search other than the single videotape, would you still be questioning witnesses about the consent to seize the computer?

MR. REICHEL: No, your Honor. If that's a binding stipulation, I think we can actually proceed to an argument today on the suppression motion without the calling of witnesses, submit it on the declarations that are on file from the government and what's in the declaration from the government.

THE COURT: Well, I assume you're still going to go with the Miranda argument.

MR. REICHEL: I think we can do it based on the pleadings of the parties.

THE COURT: But, Ms. Skipper, are you going to offer his statement or any part of it?

MS. SKIPPER: He did make the statement. Yes, I will be offering the statement that he made that he—or I would attempt to offer the initial statement that it's in the garage, and then there's a

Mirandized statement in which he admits to having ordered the videotape.

And there's also a 41(d) issue with regard to presentation of the search warrant. I don't know if the defendant is abandoning that argument, but the agents are here to testify to that as well.

[8]

MR. REICHEL: I think we can limit this hearing today, your Honor, to the Miranda issue and the voluntariness of his consent—to the Miranda issue. Because the consent is irrelevant if those items are not going to be offered. I think we can stick with the Miranda issue today.

THE COURT: Who is going to testify on that, both Welsh and Esteban?

MS. SKIPPER: Yes, your Honor. They were both present at the interview of the defendant.

THE COURT: If you just called Esteban, then you wouldn't have to worry about the Jencks Act.

MS. SKIPPER: That's true, your Honor.

THE COURT: I don't know whether they're cumulative or not.

MS. SKIPPER: He was present as a note-taker. He did observe everything that occurred. He observed the conversation. He observed the giving of the Miranda warning and Mr. Grubbs' agreeing to testify. So he could.

THE COURT: Why don't you consider that, and then we can shorten the hearing.

MR. REICHEL: I think we could, your Honor. And I'd like to be heard in argument. I think that some of the undisputed facts is something I'd like to highlight for the Court. But if we limit it to the Miranda issue, I think we could get it done quickly.

[9]

THE COURT: All right. So we'll limit it to the Miranda issue. That's the only issue upon which the defendant wishes to offer evidence in light of the government's stipulation to which the Court will hold the government at trial.

MS. SKIPPER: I just have one question, your Honor. Because Postal Inspector Welsh is present, will there be a problem with Postal Inspector Esteban testifying as to what Inspector Welsh told the defendant and the response that was elicited?

THE COURT: It's not being offered for the truth of the matter asserted. It's being offered to show what advice the defendant was given. So it's not hearsay.

MR. REICHEL: That's correct, your Honor. I would agree. And the rules of evidence don't apply at a suppression hearing, I believe, so hearsay does come in.

MS. SKIPPER: I just wanted to ensure that the best evidence problem didn't arise.

THE COURT: Let's go with Esteban, and if you have any problems or you wish to call Welsh after Esteban testifies, I'm not going to hold you to that. You can go ahead and call him.

MR. REICHEL: I'm going to ask for exclusion of witnesses, though, your Honor. That Inspector Welsh stay in the hallway during this testimony.

[10]

THE COURT: If he's the government's representative, I'll let him stay. Is he your case agent?

MS. SKIPPER: Yes, he is the case agent, your Honor.

THE COURT: I'll let him stay.

MS. SKIPPER: And the government has no objection to Mr. Reichel calling those witnesses if he wishes to. I have them present. He's welcome to call them.

THE COURT: How do you wish to proceed, Mr. Reichel?

MR. REICHEL: I'd like to just question Inspector Esteban on the Miranda matter.

THE COURT: All right. You may proceed.

PATRICK ESTEBAN,

a witness called by the Defendant, having been first duly sworn by the Clerk to tell the truth, the

whole truth, and nothing but the truth, testified as follows:

THE WITNESS: I do.

THE CLERK: Thank you. Have a seat on the witness stand. State your name for the record and spell your last name, please.

THE WITNESS: My name is Patrick Ray Esteban, E-s-t-e-b-a-n.

DIRECT EXAMINATION

BY MR. REICHEL:

Q. Thank you, your Honor. Mr. Esteban, I assume you were present during the search of Mr. Grubbs' home back in April of [11] this year?

A. Yes, I was.

Q. You were present with eight other law enforcement officers; is that correct?

A. About. About eight other law enforcement officers.

Q. Is there a reason you don't know exactly how many?

A. We had postal inspectors and Galt police officers there.

Q. Do you remember that day clearly or is there a problem with your recollection of the day?

A. I remember it clearly.

Q. Did you prepare a report in connection with your activity that day?

A. I prepared a memo. Memo of investigation.

Q. When did you prepare that memo?

A. Approximately two days—a day to two days after the incident.

Q. Have you reviewed that memo prior to your testimony here today?

A. Yes.

Q. Did you review it today?

A. About a week ago.

Q. Did it aid your recollection of the events?

A. Yes.

Q. Did it seem accurate when you reread it?

[12]

A. Yes.

Q. Okay. Ms. Skipper has told you that I have a motion to suppress the evidence in this case; correct?

A. Yes.

Q. And you know who Ms. Skipper is. She's the government prosecutor sitting there?

A. Yes.

Q. And you've spoken to Inspector Welsh about that fact; correct?

A. Yes.

Q. And the fact is I have a motion to suppress the evidence in this case?

A. Yes.

Q. Did you, in fact, review my written motion?

A. Yes.

Q. That was provided to you by Inspector Welsh?

A. Yes.

Q And you recall that motion highlighted the areas I thought there had been certain illegalities with the arrest and the search that day?

A. Yes.

Q. And after you read that, you then spoke to Inspector Welsh about that motion?

A. We discussed it.

Q. Is that the same as speaking to him about it?

[13]

A. Yes.

Q. And you discussed it with Ms. Skipper as well; correct?

A. Yes.

Q. And you discussed the fact that you were going to testify here today; correct?

A. Yes.

Q. Did you testify before the grand jury in this case?

A. No.

Q. And the report that you prepared, did you have plenty of time to prepare that report?

A. Yes.

Q. How many pages is it?

A. About one page.

Q. Okay. And did you—I mean you're trained to put everything that's important into that report; correct?

A. Yes.

Q. And if something was important that happened in that field for the case, you would put it in that memorandum; correct?

A. Yes.

Q. So it's fair for us to conclude that if it's not in the memorandum, it wasn't important; correct?

A. Yes.

Q. And, in fact, it's also very fair to conclude that if [14] it wasn't in the memorandum that it didn't happen that day; correct?

A. Yes.

Q. I'm sorry. I never received your memorandum so I can't cross-examine you on that today, but I need to know about the preparation of it. Okay?

A. Yes.

Q. And you've been trained in how to prepare those reports?

A. Yes.

Q. And you agree with me that the important material goes in there?

A. Yes, sir.

Q. Now, that day -

THE COURT: Is this a Jencks?

MR. REICHEL: I've never received the report from him, your Honor.

THE COURT: I know. But if the witness says that he reviewed something that refreshed his recollection, you can see it.

MR. REICHEL: I agree, your Honor.

THE COURT: You said you can't see it.

MR. REICHEL: I don't have it, your Honor.

THE COURT: Oh.

MR. REICHEL: I've never been provided with it.

[15]

THE COURT: Well, if he reviewed it, you're entitled to see it.

MS. SKIPPER: I was not aware that such a report existed. However, I'm informed that it may be in a bag down in my office.

THE COURT: Is that right, Mr. Esteban?

THE WITNESS: Yes, your Honor.

THE COURT: You're entitled to see it.

MR. REICHEL: I agree, your Honor. Perhaps I can question him for a while, then we can see.

Q. Now, that morning, do you recall that morning clearly?

A. Yes.

Q. That was back in April; correct?

A. Yes.

Q. What date was it in April?

A. I would have to see my memo again.

Q. Okay. That's okay. Did you receive a briefing from Inspector Welsh that morning about what was going to go on?

A. We received a briefing the night before and also in the morning.

Q. And you were gathered with—I'm telling you there was nine altogether, including yourself. Does that sound about right, nine law enforcement officers?

A. I believe so.

Q. And it's correct that for officer safety purposes and [16] just to have a more efficient search, you were wearing clothing which clearly identified you as law enforcement; correct?

A. Yes, sir.

Q. Did it say police on there?

A. Yes.

Q. Did it also say federal or U.S. Marshals?

A. It said United States Postal Inspector.

Q. And that's what you wore?

A. Yes.

Q. Is it a very vibrant color or outstanding? Is it black with yellow letters or something?

A. Wore blue raid jackets with gold lettering.

Q. Do you have a service revolver?

A. I have a service 9 millimeter pistol, sir.

Q. Which is a gun?

A. Yes.

Q. And you had your gun that morning?

A. Yes.

Q. And you had your gun, you have access to it, correct, it's on your belt or something?

A. Yes.

Q. Is there a holster that goes around you?

A. Yes.

Q. And the gun was in the holster?

[17]

A. Yes.

Q. Loaded?

A. Yes.

Q. And all of the other law enforcement officers that were there that day, they also had their weapons; correct?

A. Yes.

Q. And all of their weapons were loaded as well?

A. Yes.

Q. And they would be wearing them around their waist or on their body?

A. Yes.

Q. Okay. Now, that morning you saw the delivery of a package to the Grubbs residence; correct?

A. Yes.

Q. And after the delivery, you saw at least one officer go up to Mr. Grubbs who was outside of the residence; correct?

A. Yes.

Q. And do you recall which officer that was?

A. Tom Brucklacher. He is a postal inspector.

Q. Did you go with him at that time?

A. Yes.

Q. So you approached Mr. Grubbs?

A. Yes.

Q. Have you read Inspector Welsh's declaration about what happened that day?

[18]

A. Yes.

Q. He prepared a report about what happened that day; correct?

A. He prepared a presentation report.

Q. That's what I'm referring to.

A. I have not reviewed that report.

Q. Okay. You haven't. How about the criminal complaint in this case?

A. Yes.

Q. Did you read that?

A. Yes.

Q. And you recall that Inspector Welsh stated that Mr. Grubbs was approached outside his residence; correct?

A. Yes.

Q. And he was detained outside of his residence for a moment; correct?

A. Yes.

Q. And this is by law enforcement?

A. Yes.

Q. And, in fact, you were one of the people, one of the law enforcement?

A. Yes, I was.

Q. So this was the first officer you identified and yourself; correct?

A. Yes.

[19]

Q. Was there another one?

A. There was a Galt police officer.

Q. So there were three?

A. Yes.

Q. Now, there were additional officers who were then immediately coming to the residence as well; correct?

A. Yes.

Q. I mean it was timed to be that way; correct?

A. Yes.

Q. So if there were nine, there would be six additional officers coming to the front door of the residence; correct?

A. There were many law enforcement officers there, and Mr. Grubbs was with me at the corner of the residence. My attention was focused on Mr. Grubbs.

Q. There were how many vehicles would you say? At least four vehicles that pulled up to the house at that point?

A. Approximately three to four.

Q. And is it fair to say that things moved really quickly?

A. Yes.

Q. You don't want Mr. Grubbs to get away; correct?

A. No.

Q. You don't want him to destroy any evidence; correct?

A. No.

Q. You can agree with me that what's on your mind is he [20] may have that videotape on him; correct?

A. What's on my mind is he does not have any weapons, and he cannot hurt myself, other officers, or himself.

Q. And that's a very big concern of yours; correct?

A. Yes.

Q. So the first thing to do is to stop him, to detain him; correct?

A. Yes.

Q. And, in fact, that's what happened?

A. Yes.

Q. Put a stop on him right away?

A. Yes.

Q. And did you say to him—let me rephrase the question. I'm sorry. You heard someone say to him: You know why we're here, don't you? Correct?

A. Yes.

Q. You heard that. And Mr. Grubbs responded at that point; correct?

A. Yes.

Q. He responded yes?

A. Yes. Mr. Grubbs did say yes.

Q. Okay. And he then stated something else about yeah, the videotape, or something to that effect?

A. Something to that effect.

Q. Do you recall exactly what he said?

[21]

A. I believe he said do you know why—well, someone approached him. I believe it was Inspector Welsh. And it was about the videotape. And Mr. Grubbs stated, "Yes, I know why you're here. It's in the garage."

Q. Now, one of the things you did that day was record when his Miranda rights were read to him; correct?

A. Yes.

Q. And you agree with me that at this point his Miranda rights hadn't been read to him; correct?

A. At that point, no.

Q. So they had not been read to him?

A. Not at that point.

Q. Okay. At a later point did you witness his Miranda rights being read to him?

A. Yes.

Q. Did you put that in your report?

A. I believe I did.

Q. Okay. Now, in your Memorandum to Case File, if you put a time in there that something happened that was significant, would that time be accurate?

A. It's an approximation. Because my watch, I'm going off my watch, and my watch may be off a minute or two.

Q. I'm sure you're going to agree with me that if you put a time in your memorandum, that that was at least the time your watch stated; correct?

[22]

A. Correct.

Q. What I'm getting at, sir, is that you've stated that Mr. Grubbs was advised of his Miranda rights at 7:53 a.m. by Inspector Welsh. Okay? Does that refresh your recollection?

A. Yes.

Q. Do you want me to show you your Memorandum to Case File?

A. Sure, I'd like to see it.

Q. Okay.

A. That's all right. You could go over it with me.

Q. Do you recall that it was about 7:25 a.m. is when you approached Mr. Grubbs outside of the house that morning?

A. About that time, yes.

Q. If I were to tell you that your memorandum says 7:25, do you think that's right about the time you did?

A. May I see my memorandum?

MR. REICHEL: Absolutely.

Permission to approach this witness, your Honor?

THE COURT: Yes.

THE WITNESS: Yes.

Q. BY MR. REICHEL: The memorandum aside, do you think it was about 30 minutes before Mr. Grubbs was advised of his Miranda rights?

A. Looks like it approximately. 7:53. I write down at 7:53 a.m., Inspector Welsh advised Grubbs of his [23] constitutional rights per Miranda.

Q. Do you have any reason to think that it happened differently than what you put in your memorandum?

A. No.

Q. Okay. So as you sit here today, do you think it was approximately 30 minutes before Mr. Grubbs was read his Miranda after you first approached him; correct?

A. About that time.

Q. Okay. Thank you. Now, you understood that the officers were going to do a protective sweep search of the residence; correct?

A. Yes.

Q. And they were going to do that right away because that's the nature of the protective sweep; correct?

A. Yes.

Q. So you and I can agree that at least as soon as you you're talking to Mr. Grubbs out in front, the officers are already inside the house; correct?

A. Yes.

Q. But Mr. Grubbs had informed you when you first saw him that the videotape was in the garage; correct?

A. He made that statement, yes.

Q. And that's what you were there to search for was the videotape; correct?

A. Yes.

[24]

Q. And did you take—you took handwritten notes when he was being interviewed by Inspector Welsh inside the house?

A. Yes, I did.

MR. REICHEL: Your Honor, that's the questions I have for this officer.

THE COURT: Ms. Skipper, do you want to cross-examine?

MR. REICHEL: May I approach the witness just for a moment, your Honor, to take the memo back and take a look at it?

THE COURT: Yes.

CROSS-EXAMINATION

BY MS. SKIPPER:

Q. Inspector Esteban, when you first approached Mr. Grubbs outside the residence, did you speak with him?

A. When we first approached, Inspector Brucklacher told him to stop where he was, and I was there and I also told Mr. Grubbs to stop.

Q. At that time did he say anything or ask you any questions about being under arrest?

A. No.

Q. Did you tell him he was under arrest?

A. No.

Q. And did you perform a pat-down search or anything of that nature at that time?

A. Yes, I did. We walked Mr. Grubbs up to the corner, [25] corner of his house on the sidewalk, and I asked Mr. Grubbs if he had any weapons, and I patted him down.

Q. Now, at that time who was present with Mr. Grubbs?

A. There was also a Galt police officer there, and he was—it was basically a Galt police officer and myself.

Q. Now, at some point Inspector Welsh walked up to you; is that correct?

A. That is correct.

Q. And at that time do you recall what it was he said?

A. Something about—I just remember patting him down. I can't recall exactly what was said.

Q. Do you recall if he asked Mr. Grubbs any questions?

A. No.

Q. Now, when you were being questioned by Mr. Reichel, he asked you about a question or a statement that Inspector Welsh may have made. Do you recall Inspector Welsh walking up and saying to Mr. Grubbs: You know why we're here?

A. Right. Right. I was confused on the sequence of events there. Everything was going on so fast. I patted down Mr. Grubbs, and Inspector Welsh approached him and asked him, "Do you know why we're here?

Q. Did he say, do you know why we're here? It was a question that he asked? Is that what you recall?

A. To be honest with you, I'm a little nervous.

Q. Are you unsure about that?

[26]

A. I'm not unsure about that. Inspector Welsh did approach Mr. Grubbs and words were exchanged. Mr. Grubbs was cooperative. He was very cooperative. He said something about the tape being—I know why you're here, and it's in the garage, and Inspector Welsh said why don't we go talk about it inside.

Q. Now, at this time you were armed; am I right?

A. Yes.

Q. Was your gun drawn?

A. No, my gun was not drawn.

Q. And there were other law enforcement officers around at that time; is that right?

A. Yes.

Q. Were their guns drawn?

A. I don't believe so.

Q. And you said that Mr. Grubbs was cooperative; is that right?

A. Yes. He was very cooperative.

Q. Now, while you were outside the house, do you recall Mr. Grubbs questioning whether he was going to be handcuffed or whether he was under arrest?

A. Yes, I do.

Q. Can you tell us what occurred there?

A. Well, Mr. Grubbs was worried, and he said he did not want to be handcuffed in front of his children or his [27] neighbors. And I remember Inspector Welsh was there, and he reassured him, you know, we need to talk about this matter. Let's go inside. And we did not handcuff Mr. Grubbs as we walked him back into the house.

Q. Did Inspector Welsh tell Mr. Grubbs that he was under arrest?

A. No.

Q. Did he say that he was not under arrest?

A. No.

Q. Once you got inside the home, where did you go?

A. We went straight to the kitchen table.

Q. And who went to the kitchen table?

A. Mr. Grubbs, myself, and Gary Welsh.

Q. The other agents, were they in the room too?

A. Yes, but they were—they've already completed the protective sweep, and they're lining up for the search.

Q. Were they in the room, in the dining room where you, Inspector Welsh, and Mr. Grubbs were?

A. No.

Q. But they were in the residence?

A. They were in the residence, yes.

Q. And they were preparing to conduct the search?

A. Yes.

Q. Do you know what was occurring in between the time you say you first contacted Mr. Grubbs outside and you began the [28] interview of him in the dining room?

A. Yes.

Q. Mr. Reichel has brought up a 30- to 35-minute lag.

MR. REICHEL: Judge, this is really a leading question, I believe.

THE COURT: All right. Just ask the question.

Q. BY MS. SKIPPER: Do you know what occurred during that time.

A. Yes.

Q. What was occurring?

A. We were preparing to interview Mr. Grubbs.

Q. During the interview of Mr. Grubbs, the substantive part of the interview here, were you asking questions?

A. I was asking personal history questions, and I was taking notes. I initially took notes.

Q. When you say initially took notes and then asking—

A. I was just asking Mr. Grubbs his name, his date of birth.

Q. Did that occur before or after Inspector Welsh engaged in his questioning?

A. It occurred after.

Q. And you were present when Inspector Welsh gave Mr. Grubbs his Mirnda rights.

A. Yes, I was present.

Q. And at that time did Mr. Grubbs indicate that he [29] wanted to answer questions?

A. Yes. He was cooperative, and he just appeared anxious to give us information.

Q. Did you have your gun drawn at that point?

A. No. My gun was in its holster snapped.

Q. Did you draw your gun at any time during the execution of the search warrant?

A. No.

Q. Did Inspector Welsh have his gun drawn during this interview?

A. No.

Q. Did you see him with his gun drawn at any point during the execution of the search warrant?

A. No.

Q. Did you see any law enforcement officer with their gun drawn during the execution of the search warrant?

A. No.

Q. During the interview, I'm talking about the portion that Inspector Welsh engaged in, did Mr. Grubbs indicate that he wanted to take a break or wanted to stop the interview?

A. No. But I recall Inspector Welsh had asked him if he wanted water or use the bathroom, and Mr. Grubbs declined. And I know at one point I asked him that, too, during our interview.

Q. And when you asked him that, what was his response?

[30]

A. No.

Q. Can you describe his demeanor during the interview?

A. Well, he was very concerned, very anxious, but he was cooperative. He told us he wanted to talk and get this thing settled.

Q. Was he handcuffed at this point?

A. No.

Q. Were there other law enforcement officers maybe walking in and out of the dining room as this interview was being conducted?

A. I believe a few may have walked in and out.

Q. Did any of them have their guns drawn?

A. No.

Q. Do you know where Mrs. Grubbs, Mr. Grubbs' wife, was while you were conducting this interview?

A. I didn't see her during the interview. I believe she may have been in the living room.

Q. Do you recall getting the written consent to search the electronic storage media that were found in Mr. Grubbs' residence?

A. Yes.

Q. When did that occur during the execution of the search warrant?

THE COURT: I thought we weren't going to go into that.

[31]

MS. SKIPPER: I'm sorry. You're right. I saw the note, and I realized it was something I hadn't covered.

Thank you, your Honor.

Q. Do you recall how long the interview lasted?

A. Yes. It was about an hour.

Q. What occurred at the conclusion of the interview?

A. At the end of the interview, I pulled out my agency form, a personal history questionnaire, and I just went over it with Mr. Grubbs.

Q. Were you asking him questions?

A. Right. Additional questions like his spouse's name. And I just went through that form.

Q. Was Inspector Welsh present while you were asking him questions from the questionnaire?

A. I don't believe so. He was—

Q. He had left the room?

A. He had left the room, and he was communicating with other officers and agents there.

Q. At some point did he come back into the room?

A. Yes.

Q. What occurred then?

A. Right after I read off the personal history questions with him?

Q. Yes.

A. He was arrested. Mr. Grubbs was arrested.

[32]

Q. Was he told he was under arrest at that point?

A. Yes.

Q. Was he immediately placed in handcuffs?

A. Yes.

Q. Immediately after being told he was under arrest?

A. He was told to stand up, and then yes.

Q. Just one more question. Did you at any time observe Inspector Welsh giving Mr. Grubbs a copy of the search warrant?

MR. REICHEL: Objection, your Honor.

THE WITNESS: Yes.

MR. REICHEL: Beyond the scope of the direct:

THE COURT: Is that an issue that you wanted to address or not?

MR. REICHEL: Well, I thought it was addressed well enough in the pleadings, your Honor.

THE COURT: Go ahead then. If it's one that's still in issue, you may ask him questions about it.

Q. BY MS. SKIPPER: When did that occur?

A. That occurred as we were walking toward—as we came into the house, I cleared the table, this kitchen table. There were some objects on the table, and I just cleared it out. Mr. Grubbs sat down, and at that point Inspector Welsh produced the search warrant and put it on the table in front of Mr. Grubbs.

[33]

Q. Did he say what it was he was putting down on the table?

A. Yes.

MR. REICHEL: Objection, your Honor. Leading question.

THE COURT: Overruled.

MS. SKIPPER: No further questions, your Honor.

THE COURT: No, he didn't answer. I'm sorry. I was ruling so I didn't hear what he had so say.

THE WITNESS: Yes, he did tell Mr. Grubbs this is the search warrant.

MS. SKIPPER: Thank you, your Honor.

THE COURT: You may cross-examine on that and redirect on the rest of it.

MR. REICHEL: Thank you very much, your Honor.

REDIRECT EXAMINATION

BY MR. REICHEL:

Q. Inspector Esteban, in reviewing your Memorandum to Case File which I received just now, in there you stated that you drove up to Grubbs' residence, got out, identified yourselves as police and approached Grubbs.

Do you recall that?

A. Yes, I do.

Q. That happened?

A. Yes.

[34]

Q. He was ordered to step away from his vehicle, is the next sentence?

A. Yes.

Q. So that happened? It says, "Grubbs was compliant and did not resist." Correct?

A. Yes.

Q. Grubbs was told to step away from the house and was taken toward the corner; is that correct?

A. Yes.

Q. And that's what happened, that's what you recall that day?

A. Yes.

MR. REICHEL: Permission to approach the witness, your Honor?

THE COURT: What do you have there?

MR. REICHEL: His Memorandum to Case File. We have one copy. It's what I just got It's his written report two days after the search.

THE COURT: All right.

Q. BY MR. REICHEL: Inspector Esteban, I'm going to ask you if that report states anything in there about putting a search warrant on a table. Does it?

A. No.

Q. You reviewed that report prior to your testimony in this case; correct?

[35]

A. Correct.

Q. And that report doesn't mention anything about a search warrant being shown to a defendant; correct?

A. Correct.

Q. Did you talk to Inspector Welsh about what happened that day, and in that conversation with him recently, has he told you do you remember what happened with the warrant?

A. Yes, but I do remember—I do remember seeing that warrant folded put on that table. I do remember that.

Q. Let me ask you some questions. I appreciate it, but I want to ask you some questions first. Okay? You didn't put it in your report; correct?

A. Correct.

Q. Now, you read my motion that I filed in this case to suppress the evidence; correct?

A. Correct.

Q. And you remember my motion said they never showed my client the warrant; correct?

A. Correct.

Q. And then you spoke to Ms. Skipper first about this issue or was it Mr. Welsh first about this issue?

A. It was Inspector Welsh.

Q. I'm sorry. Inspector Welsh. What was the first conversation you had with Inspector Welsh after you read my motion? Where was it at?

[36]

A. It was at our office.

Q. And you talked about the fact that you may have to testify in this case; correct?

A. Correct.

Q. And you talked about the fact that you made handwritten notes of what happened that day; correct?

A. Correct.

Q. Do you still have your handwritten notes?

A. I believe they're with the case file.

Q. Okay. So they're in the file. And you and I agree that the reason you have these handwritten notes is to write down the important stuff; correct?

A. Yes.

Q. So you can put it into the report later?

A. Yes.

Q. So it can refresh your recollection?

A. Yes.

Q. So there will be no dispute later on what happened?

A. Yes.

Q. Thank you. And if it's not in your written report, do you believe they're probably not in your handwritten notes; correct?

A. It should be.

Q. It should be in your handwritten notes?

A. It should be.

[37]

MR. REICHEL: Okay. Can we get those notes?

THE COURT: Where are the notes?

THE WITNESS: They should be with the case file, your Honor.

THE COURT: Is that here?

THE WITNESS: I don't have control of the case file.

THE COURT: Is it in the U.S. Attorney's Office or where is it?

MR. REICHEL: Your Honor, we may have them. If I can show it to him and see if he can determine if these are his handwritten notes.

THE WITNESS: These are my notes. Yes.

THE COURT: Do you want to mark them for identification?

MR. REICHEL: Yes.

THE COURT: Defendant's Exhibit A for identification.

MS. SKIPPER: Your Honor, because that is the investigation file, perhaps we can remove those pages.

THE COURT: Only the pages that constitute his handwritten notes are marked Exhibit A for identification.

(Inspector Esteban's handwritten notes were marked as Defendant's Exhibit A for identification.)

Q. BY MR. REICHEL: Let me back you up in time that day.

[38]

After Mr. Grubbs was approached outside the house and there was a conversation about the videotape; correct?

A. Yes.

Q. And then we go into the house and there's this continuing conversation with Mr. Grubbs for an interview that lasts almost an hour; correct?

A. Correct.

Q. That interview concludes about an hour after it starts, and your report says that interview concludes around 8:55, I believe?

A. Yes.

Q. So your interview concludes about 8:55. At any time between 7:25 when you first approached and when the interview started at 7:50 something, Mr. Grubbs, in fact, asked you what's this about, what exactly is going on; correct?

A. I believe so.

Q. And you told Mr. Grubbs several times hey, it's better for you not to say anything. Something along those lines. Correct?

A. I don't recall that.

Q. Did you tell him we can't tell you right now?

A. I don't recall saying that.

Q. Do you recall saying you should just keep quiet for right now?

A. I don't recall saying that.

[39]

Q. Do you recall saying it's better for you to be silent?

A. I don't recall saying that.

Q. Well, you recall Mr. Grubbs definitely saying what exactly is this about, what's going to happen, what's going on?

A. I tried to calm him down because he was anxious.

Q. And he definitely said what's going on; correct?

A. I can't recall that.

Q. But something to that effect?

A. I can't recall that.

Q. Okay.

A. He was anxious about us being there and about law enforcement being there.

Q. Well, I'm going to provide you with your handwritten notes. And I can read your handwriting. But permission to approach the witness, your Honor?

THE COURT: Yes.

Q. BY MR. REICHEL: I'm showing you what's been marked as Defendant's Exhibit A for identification. This is going to take a few minutes,

Inspector, but I note in there there's no handwritten notes about showing a warrant to Mr. Grubbs. But I'd like you to verify that, because they're your handwritten notes.

A. I missed it. I guess I did not write that.

Q. How many pages are those handwritten notes?

[40]

A. Nine.

Q. Both sides or just one side?

A. There's one that takes up—the first page is written on both sides.

Q. Now, Inspector, you spoke with Ms. Skipper about your testimony here today, correct, before you testified?

A. Yes.

Q. You met with her?

A. Yes.

Q. You talked about this issue of whether or not Mr. Grubbs was shown the warrant; correct?

A. Yes.

Q. But it wasn't in your notes; correct?

A. Appears not.

Q. Nor your report?

A. It appears not, no.

Q. Did Ms. Skipper tell you that—excuse me.

Ms. Skipper, she discussed your anticipated testimony; correct?

A. Yes.

Q. And which you prepared for this hearing basically; right?

A. Yes.

Q. And you told her that you were going to testify that the warrant was shown to Mr. Grubbs; right?

[41]

A. Yes. From my visual recollection and my memory. I remember seeing that. I missed it. I missed writing it down.

Q. The table, was it a round table or a square table?

A. It was oval, oval type shape.

Q. And Mr. Grubbs was standing or sitting?

A. He was sitting.

Q. And where was Inspector Welsh?

A. Inspector Welsh was, I believe, on my left side.

Q. Were you sitting or standing?

A. I was sitting.

Q. And he was on your left. Where was Mr. Grubbs in relation to that?

A. Where I'm sitting here, Mr. Grubbs was sitting here. Inspector Welsh I believe was here. A couple times he would move over to this side closer to Mr. Grubbs.

Q. As you sit here today, do you actually recall what hand you handed him the warrant with?

A. With his left hand. I'm sorry. Can you rephrase that?

Q Yes. As you sit there today, do you actually recall what hand he handed Mr. Grubbs the warrant with?

A. Inspector Welsh?

Q. Yes, sir.

A. I think it was his left hand.

Q. Okay. Did you have any conversations with Mrs. Grubbs [42] that day?

A. No, I did not.

Q. And did you hear her talking to any of the other agents there were there that day?

A. I heard her voice, but I didn't hear what she was talking about.

Q. But she was definitely having conversations with them?

A. Yes.

Q. In fact, she was required to sit in a certain area of the house and she couldn't mill around the house; correct?

A. Some other people were with her, but I don't remember—I don't know what the circumstances were around that.

Q. What pocket did Inspector Welsh pull this warrant out of, that you recall?

A. He had it inside his jacket.

Q. Which-side? The right or the left side?

A. I don't know, sir. I just know that he took it out of his jacket.

Q. Okay.

A. I remember seeing him take it out of his jacket and put it on the table.

Q. Do you recall what Mr. Grubbs said in response to that?

A. Mr. Grubbs? I don't think he responded at all. He [43] just sat there.

MR. REICHEL: Thank you.

THE COURT: Redirect?

MS. SKIPPER: No, your Honor.

THE COURT: Thank you, Mr. Esteban. You may step down.

THE WITNESS: Thank you, your Honor. The exhibits, would you like me to—

THE COURT: Just leave them there.

Mr. Reichel, are you going to call any other witnesses?

MR. REICHEL: I don't think so, your Honor.

THE COURT: Is the government going to call any other witnesses?

MS. SKIPPER: Yes, your Honor. I was trying to avoid this eventuality, but I think I do need to call Inspector Welsh.

THE COURT: So you're not going to ask me to decide this today. You're going to ask me to take it under submission?

MR. REICHEL: Yes, your Honor. I have a witness that was not going to testify, but if Mr. Welsh is going to testify, I may call Mrs. Grubbs, and I would ask her three or four questions. And she would testify only about the issue of the warrant being shown or being present.

[44]

MS. SKIPPER: Well, then I think he should call that witness now.

MR. REICHEL: It's only based on Inspector Welsh's testimony. I'm willing to submit it at this point.

THE COURT: Well, it's up to you. Go ahead.

MS. SKIPPER: Inspector Welsh.

GARY WELSH,

a witness called by the Government, having been first duly sworn by the Clerk to tell the truth, the whole truth, and nothing but the truth, testified as follows:

THE WITNESS: I do.

THE CLERK: Thank you. State your name and spell your last name for the record, please.

THE WITNESS: Gary Welsh, W-e-l-s-h.

MR. REICHEL: I'm sorry to interrupt, your Honor. If the earlier inspector is going to testify any further, he's in the courtroom observing the testimony.

THE COURT: He may testify if you're going to put this over. We have no way of knowing what's going to come up, so I think you better have Mr. Esteban step out of the courtroom.

MR. REICHEL: Thank you, your Honor.

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MS. SKIPPER:

Q. Inspector Welsh, you are a United States postal [45] inspector; is that right?

A. Yes, I am.

Q. Where are you presently assigned?

A. San Francisco, California.

Q. What is your present assignment?

A. I investigate child pornography trafficking and violations of child exploitation laws.

Q. Are you the child sexual exploitation specialist for the Northern California division?

A. Yes, I am.

Q. Are you the case agent on this case?

A. Yes, I am.

Q. Were you the affiant for the search warrant?

A. Yes, I was.

Q. So you were present at the execution of the search warrant; is that right?

A. Yes, I was present.

Q. And what was your first contact with Mr. Grubbs on that day?

A. As I approached in my vehicle, inspectors had already tentatively secured the outside front of the residence, I approached, and Mr. Grubbs was standing with Inspector Esteban on the northwest corner of the property on the sidewalk.

Q. Did you say anything to Mr. Grubbs at that time?

A. I walked up and introduced myself, and I paused and I [46] made the statement, nodding, "You know why we're here."

Q. Did you state that as a question?

A. No.

Q. Were you particularly aware of whether you stated that as a question or not?

A. Yes.

Q. Why?

A. Because I didn't want to ask any questions prior to Miranda.

Q. Did Mr. Grubbs respond?

A. Yes.

Q. What did he say?

A. He made a statement that he knew why we were here, the package was in the garage.

Q. Did you tell him he was under arrest at that point?

A. No. In fact, I assured him that he was not under arrest; that we were still investigating the matter.

Q. Did he express any concern about being handcuffed?

A. Yes, he did. He told me that he was embarrassed, and he didn't want to be handcuffed in front of his children or his neighbors. And I said well, there's no need to at this point that I can see, and I think we should move into the house and talk about the case as quickly as possible.

Q. Were you armed?

A. Yes, I was.

[47]

Q. Did you pull your gun?

A. No, I did not.

Q. Did you see any other guns drawn as you approached Mr. Grubbs?

A. No, I did not.

Q. Now, Inspector Esteban recorded a gap in between the first time he approached Mr. Grubbs and the beginning of the interview. Do you recall a similar gap as well?

A. The 30 minutes? There was approximately 30 minutes, I think, from the time we approached the house and sorted things out, got into the house, and Mr. Grubbs and I and Pat Esteban went in and

sat down. It was about 30 minutes I think all told before we began the interview.

Q. What was occurring during that period of time?

A. Well, we had to get in, we talked to his wife, explained to his wife why we were there. I made sure the kids got off to school on time. We checked their backpacks, of course, as per safety procedures and to make sure nothing was leaving the house. We took care of that. We went in, photographs were taken of the house, sketches, hand drawn sketches of the house had to be made. It took a while to clear things away from the table. We also had to deal with the fact that narcotics paraphernalia were found on the defendant plus on the table that we were about to do the interview on. So all told, I think all those preliminaries [48] took about 30 minutes.

Q. Where did the interview take place?

A. In the dining room of the residence.

Q. Was Mr. Grubbs seated at the table?

A. Yes, he was.

Q. And where were you?

A. I was sitting kind of kitty-corner from him, not on a 90-degree angle, but kind of off the table facing him.

Q. Was Inspector Esteban also present?

A. Yes, he was.

Q. And at that time had you placed Mr. Grubbs under arrest?

A. No, I had not.

Q. Did you discuss whether he was under arrest once you actually got into the dining room?

A. I again reassured him. He asked me if he was under arrest once we got in and sat down again, and I said no, no, but I would like to clear this up, and before we proceeded I went into Miranda.

Q. Did you give him a copy of the search warrant?

A. Yes, I did.

Q. And how did that occur?

A. Just as we were sitting down, I produced the search warrant out of my blue police jacket and set it on the table next to us, and I said we have a search warrant for your [49] house. These individuals will be conducting the search warrant at the same time we'll be talking about the matter.

Q. Did he respond to that in any way?

A. He didn't respond significantly either way, no.

Q. You mentioned a moment ago that you read him his Miranda rights. How did you do that?

A. Off my Miranda card that I keep in my credential case.

Q. And did he indicate a willingness to answer questions?

A. I read his Miranda rights to him. I asked him if he understood his Miranda rights. He acknowledged he did understand them, and I began questioning him about the matter.

Q. Now, you stated that Inspector Esteban, Mr. Grubbs, and you were in that room. Were there any other agents in the room?

A. No, not really. From time to time during the interview somebody may step in and ask me a question about what they were doing, but no other agents were in the room when we were conducting the interview as a whole.

Q. When other people came into the room, did any of them have their guns drawn?

A No.

Q. Is that something that you would recall if they had?

A Absolutely.

Q. How long did this interview take?

A Approximately an hour.

[50]

Q. And during that time did you or Mr. Grubbs take any breaks?

A. I may have stepped aside for a moment or two to answer some questions from some of the other search members, but I don't believe there was any real breaks involved.

Q. Did Mr. Grubbs at any time say that he wanted to take a break?

A. No.

Q. Did you offer him the opportunity to take any breaks?

A. Yes. At least once about midpoint during the interview I asked him if he needed anything, water, go to the bathroom or something.

Q. Did he respond to that?

A. He said he was fine.

Q. At any point during this interview, did he ask to see his attorney?

A. No.

Q. What was his demeanor during the interview?

A. Well, he was anxious, he was nervous, and he was concerned. And I guess overall he wanted to hurry up and get the interview over with and answer our questions and get on with it.

Q. Was he crying?

A. I don't recall him crying, no.

Q. Now, at some point—actually, I don't need to go [51] into that.

How did the interview conclude?

A. I think basically we said we didn't have anymore questions for him. We asked him if he had anything else to add. Anything that we may have forgotten to ask him that he thought may be of significance to us that would help us in our later investigations. After those questions were asked, I got up, I went out and checked on the status of the search with my search team, and then went outside and made a telephone call to you and updated you on the matter, and I came back in and let Pat Esteban finish doing his personal history statement. And at that time I informed him based on the evidence found and what he's told us, I was placing him under arrest for a violation of the child pornography laws.

Q. Now, at that time did you have your gun drawn?

A. Oh, no.

Q. Did anyone else come into the room with you with their guns drawn?

A. No.

Q. During this entire execution of the search warrant, did you see anyone with their gun drawn?

A. No.

Q. And in your experience in this sort of search considering Mr. Grubbs' assistance and the fact that he was not combative, would anyone have drawn their gun?

[52]

A. I can't imagine anyone under those circumstances that day at his residence drawing their weapon for any reason, especially since there was children present, his wife had already answered the door. The door was open by the time the bulk of the search team arrived. No, there was no circumstances at all in my mind that would warrant drawing a weapon.

Q. Did you have a copy of the warrant affidavit at the site of the search?

A. The search warrant affidavit, yes, I did.

Q. Were other members of the team made aware of the contents of the affidavit?

A. They were.

Q. How was that done?

MR. REICHEL: Objection, your Honor. Leading question. Ask that it be stricken.

THE COURT: Overruled.

THE WITNESS: The night before at our briefing in the hotel in Lodi, I required each and every search member to read the affidavit, understand the circumstances behind the investigation and the circumstances of the warrant.

Q. BY MS. SKIPPER: And one additional question. At some point during the execution of the search, did you speak with the defendant's wife?

A. Yes.

[53]

Q. When was that?

A. Just before I think I'd handcuffed Mr. Grubbs, and I was making some last minute instructions with my crew at that part of the room, I believe she was sitting in the livingroom, and I explained to her that we were placing her husband under arrest, and we were going to take him to Sacramento, to the Marshal's Office in Sacramento.

Q. Did she say anything to you?

A. She started to cry, and I said I'm sorry, you know, I know this isn't pleasant, words to that effect, and she said it's okay, I appreciate your professionalism up to that point, you know, since the events occurred. That's basically what she said.

MS. SKIPPER: That's all the questions I have, your Honor.

THE COURT: You may cross-examine.

MR. REICHEL: Thank you, your Honor.

THE COURT: This is subject to getting the Jencks statement, after which you may choose to reopen the cross-examination if you wish.

MR. REICHEL: Yes.

CROSS-EXAMINATION

BY MR. REICHEL:

Q. Inspector Welsh, you prepared an affidavit in support of the criminal complaint in this case; correct?

[54]

A. Yes.

Q. You signed it under penalty of perjury?

A. Yes.

Q. And it was filed with the Federal Court?

A. Yes.

Q. That was to support the arrest of Mr. Grubbs?

A. Yes.

Q. Okay. You put in there that you read him his Miranda rights; correct?

A. I believe I did, yes.

Q. And you put in there that he waived his Miranda rights and spoke to you?

A. I'd have to see the criminal complaint again. I haven't seen it since it was filed.

Q. Let me ask you a question while I get it for you. Do you recall putting in the criminal complaint that you showed Mr. Grubbs a copy of the warrant?

A. I don't think so.

Q. It wasn't in the criminal complaint?

A. I'd have to look at the complaint again, but offhand I don't think I put that in the affidavit.

Q. But you put in there that he waived his Miranda rights; correct?

A. Yes. Again, you're asking me questions. I'm going to have to look at the criminal complaint again. It's been [55] months and months.

Q. Well, let me ask you a question about that. It's been months and months since April 19th; correct?

A. Uh-huh.

Q. That's what you just said. And you can't remember exactly what went into the criminal complaint or not; correct?

A. Well, I want to speak accurately to your question. If I could see the complaint, I would be able to give you a more accurate answer.

Q. Let me ask you a question. You agree with me that it's been months since the arrest; correct?

A. I agree with you.

Q. You agree with me that it's hard to answer directly what you put in the criminal complaint unless you have a chance to read it right now; correct?

A. Well, if I read the criminal complaint as it sits in front of me now, I could probably answer quicker, and my memory would be much more refreshed than it would if I didn't have it after months and months as you say.

Q. I think we agree at this point. Now, there's a reason for that; correct?

A. I don't know. I don't know what your reason for your question is.

Q. Okay. The reason you'd be better at answering the question about the criminal complaint if you had it in front [56] of you is because there's been a passage of time since the arrest; right?

A. There has been a passage of time. I agree.

Q. Secondly, you've been involved in a lot of cases since then; right?

A. A number of cases, yes.

Q. And not all cases are the same; correct?

A. Correct.

Q. They have different facts?

A. Yes.

Q. And, in fact, that's one of the reasons we write reports down of the important things that happened; right?

A. Well, we write reports because we're required to by our agency.

Q. Let me ask you. If your agency didn't require you to write a report, would you not write them?

A. I'm not sure what I'd do if my agency didn't require me to write a report. I probably would. If I had my own law enforcement agency or something, yes, I'd probably document.

Q. Well, let's say you worked as a postal inspector, but your agency didn't require you to write a report. Would you still write a report?

A. If I could perform my job without writing a report and I could do it as accurately and as professionally and as well as I could without writing a report, I probably would. But [57] that wouldn't happen because I don't think I could perform my job without memorializing things that happened.

Q Okay. Well, without me showing you the criminal complaint that you drafted on the day he was arrested, you couldn't accurately talk about what was in there; correct?

A. For the most part I could.

Q. But some things you wouldn't be able to?

A. Well, I don't know.

Q. I understand.

A. I mean if you ask me a series of questions, and I read the criminal complaint, whether I don't read the criminal complaint, I think I probably—my

reasonable conclusion would be I'd probably be more accurate over a period of time answering your questions on the criminal complaint if it was in front of me.

Q. Do you have anything else?

A. You're asking the questions. Go ahead.

Q. Thank you. Now, you also prepared a report called a presentation report; correct?

A. It's called a presentation letter.

Q. Presentation letter.

MR. REICHEL: Permission to approach, your Honor? I'm going to show him what's going to be marked as Defendant's Exhibit B for identification.

THE COURT: You may approach the witness [58]

MR. REICHEL: Thank you, your Honor.

Q. I'm going to show you the—I think this is the presentation report. Do recognize what I've just placed before you?

A. Yes.

Q. Is that what we call the presentation report?

A. Yes.

Q. And you and I can agree, I believe—

A. It's the presentation report without exhibits.

Q. The presentation report without exhibits. And you and I can agree that the important stuff should be put in that report?

A. I would say yes.

Q. And you and I can also agree that the unimportant stuff doesn't have to be in the report; correct?

A. Unimportant stuff? It depends on what the stuff is. I mean things go in the report that I feel are relevant to the investigation.

Q. Have you read this recently in preparation of your testimony?

A. It's been a week and a half since I read it.

Q. Do you recall—let me just get to the point.

There's no discussion in there whatsoever that you provided Mr. Grubbs a copy of the warrant that day?

A. No. I do remember I didn't see that in there. I [59] remember that a week and a half ago when the subject came up.

Q. Okay. So it's not in there; correct?

A. No.

Q. Thank you. And do you agree with me the important material should be put in that report?

A. Yes.

Q. And you agree with me that if something didn't happen, it can't make its way into this report; right?

A. Absolutely.

Q. So if something is important and it happened, it should be in the report; correct?

A. Probably it should be in the report.

Q. Thank you. You prepared a declaration in this case; correct?

A. Yes.

Q. And let's talk about the declaration. It's under penalty of perjury; correct?

A. Correct.

Q. It's filed on September 13th?

A. I'd have to look at the declaration.

Q. I'm going to give it to you in a minute. It's on file. I'm going to mark it as Defendant's C. You had prepared this after I filed my motion to suppress the evidence; correct?

A. I believe so, yes.

[60]

Q. Do you have any doubt about that?

A. I'd have to look at the dates on both the declaration and your motion, but I think it was filed subsequent to your motion.

Q. Was it drafted at the request of Ms. Skipper, the prosecutor?

A. Yes.

Q. And you had a copy of my motion and read my motion?

A. Yes. She faxed it to me, yes.

Q. And you and I would definitely agree that when you're going to draft a declaration, that you're at least going to highlight the issues I've read and add factual background for the Court to decide?

A. Well, as a matter of fact, I did not read your motion. I was busy that day. I had to get out of work. She asked me to write a declaration based on what occurred that day, don't leave out any details, be as accurate as possible. I believe I did that. When I went back after I did the declaration, I looked and I called AUSA Skipper and I said the motion you sent me is missing two pages. That was after I finished my declaration. She refaxed the missing pages to me, and I read your declaration.

Q. Okay. Now, this one was under penalty of perjury, this declaration, and it was done at the request of Ms. Skipper. And it was done in response to my motion to [61] suppress the evidence. Correct?

A. That's my assumption, yes.

MR. REICHEL: Permission to approach, your Honor, and to show him what's marked as Defendant's Exhibit C.

THE COURT: Yes, you may.

MR. REICHEL: Thank you.

Q. Do you recognize that Exhibit C which I've just set before you?

A. Yes.

Q. And Ms. Skipper said to put all the important facts in there, you just told us; correct?

A. She told me to put as much as I remembered.

Q. Okay.

A. And put in everything I could remember. That's right.

Q. Now, my next question is paragraphs 12 and 13 on page 2.

A. Yes.

Q. Specifically paragraph 13.

A. Uh-huh.

Q. It says, "I removed the copy of the search warrant intended for Grubbs from under my police nylon jacket."

Correct?

A. Yes.

Q. "The copy of the search warrant was folded in thirds, in legal sized letter fashion." Correct?

[62]

A. Right.

Q. And it doesn't say anything in there whatsoever about you telling Mr. Grubbs this is the search warrant; correct?

A. No.

Q. Notice paragraph 14. It says, "I placed the search warrant on the table."

A. Yes.

Q. And you notice in there it doesn't say anything in there about you telling Mr. Grubbs this is the search warrant for your house and all these officers are going to now search the premises; correct?

A. It wasn't a search warrant. It was a copy of the search warrant. And I set it on the table, and I explained to Mr. Grubbs we have a search warrant for your house, I showed him the paper. When I fold it, I always have the United States Government, United States of America portion at the top of the letter, top of the text so you can see it. When I tri-fold it, I set it down. I don't know if I spent a lot of time pointing to it saying this is the actual document or anything like that, but I did set it on the table.

Q. Okay. We all agree you set it on the table; correct?

A. Yes. I don't know. I agree. That's what I'm remembering.

THE COURT: I don't think we all agree. I don't think you agree, do you?

[63]

MR. REICHEL: No, your Honor.

Q. How about we all agree that you're testifying you placed it on the table. Let me ask you. There's nowhere in the declaration anything about a conversation of the search warrant with Mr. Grubbs other than the phrase "I placed the search warrant on the table." Correct?

Just looking at paragraph 14.

A. No, there's nothing in 14.

Q. Is there anywhere else in that declaration that conversation you had with Mr. Grubbs? In that in this declaration somewhere that I'm missing?

A. That I informed him we had a search warrant?

Q. Yeah.

A. No, not in this declaration.

Q. Thank you. So it's not in any reports, correct, the conversation you had with Mr. Grubbs?

A. You have to be a little bit more specific.

Q. You told Mr. Grubbs this is the search warrant for your house, number one, and additionally these officers are going to search pursuant to this search warrant?

A. I said here's a copy of your search warrant, and then I explained to him what the officers were doing, I explained to him why we were there, and went on from there.

Q. I'm going to call that a conversation about the search warrant with Mr. Grubbs. Okay?

[64]

A. Okay.

Q. That wasn't in any report; correct?

A. I don't see anything that you've given me now.

Q. Well, what I've given you is Exhibits A, B, and C. And those don't seem to reflect it; correct?

A. Those particular words that you're looking for I can't find them in the declaration or my presentation letter.

Q. Right. But they came out today in your testimony?

A. Yes.

Q. Now, you spoke to Ms. Skipper about your testimony in this case; right?

A. Sure.

Q. And you knew a very important thing was whether or not Mr. Grubbs was given a copy of the warrant; right?

A. Yes.

Q. That's why we're here today; right? One of the reasons.

A. I know why I'm here today, but go ahead.

Q. Did Ms. Skipper talk about that subject with you, whether you gave him a copy of the warrant?

A. She said that was one of your concerns, and that was in the motion.

Q. And you talked about what you were going to testify to today; correct?

A. Yes.

[65]

Q. Okay. Let me ask you to take a look at what's been marked as Exhibit B. And that is your presentation report without exhibits.

A. Yes.

Q. Do you notice on page 8 down at the bottom paragraph 39?

A. Yes.

Q. And in there you wrote, last sentence, "Inspector Brucklacher immediately approached

Grubbs and verbally detained him as the entry search team moved in."

A. Yes.

Q. And that's accurate?

A. Yes.

MR. REICHEL: Thank you. I believe I have nothing further, your Honor, from Inspector Welsh.

THE COURT: Any redirect?

MS. SKIPPER: Briefly, your Honor.

REDIRECT EXAMINATION

BY MS. SKIPPER:

Q. Inspector Welsh, you testified that you prepared that declaration at my request; is that right?

A. Yes.

Q. Now, shortly after preparing that declaration, did you leave the state?

A. Yes.

[66]

Q. How long were you gone?

A. Two weeks. Approximately two weeks.

Q. Do you recall if you read Mr. Reichel's motion before or after you returned from vacation?

A. I thumbed through it before. I didn't read it until—actually, I didn't read it until about a week ago.

Q. Are you aware as a law enforcement officer—well, let me ask you this first. Have you participated in the execution of search warrants as a postal inspector other than the search warrant at Mr. Grubbs' residence?

A. Yes.

Q. Can you estimate how many you've participated in?

A. 75 to 80. I'm sorry. Are you talking about child exploitation warrants, or robbery warrants, or all the warrants that I've done?

Q. Let's confine it to child exploitation warrants, if you can.

A. Probably 60 to 75.

Q. And have you participated as the lead agent in the execution of search warrants other than the one at Mr. Grubbs' residence?

A. Yes.

Q. Do you know how many approximately?

A. 50.

Q. Were you aware before you read Mr. Reichel's [67] memorandum of your obligation to present a copy of the search warrant?

A. Yes.

Q. To the defendant or the resident?

A. Has to be left at the residence at the very least.

Q. And you testified earlier that you include in your report information that you believe is relevant to your investigation; is that right?

A. Yes.

Q. Do you consider your performance of the obligation to leave a search warrant to be relevant to your investigation?

A. Yes.

Q. So why was that information not included in your report?

A. Well, if I had to venture an answer, it'd probably be because it's very routine, I do it every time. I leave a copy of the warrant at the residence. It's not something that avails to the investigative matter. Just like I say I did not see any guns drawn. I didn't put that in the report either. Or I didn't find this or that. I put in the report what I think is germane to the prosecution of the defendant.

MS. SKIPPER: No further questions, your Honor.

THE COURT: Any recross?

MR. REICHEL: I don't think so, your Honor.

THE COURT: Thank you, Mr. Welsh. You may step down.

[68]

MR. REICHEL: Your Honor, I was going to call Ms. Grubbs, but she's got two children, and she's run out of child care for today.

THE COURT: Is she here?

MR. REICHEL: Yes.

MS. SKIPPER: It was my understanding that Mr. Reichel only had three or four questions for her.

THE COURT: Is she here now?

MR. REICHEL: Yes.

THE COURT: Why don't you go ahead and call her.

MR. REICHEL: Okay. Your Honor, calling Carol Bradstreet to the witness stand.

MELBA CAROL BRADSTREET,

a witness called by the Defendant, having been first duly sworn by the Clerk to tell the truth, the whole truth, and nothing but the truth, testified as follows: With.

THE WITNESS: Yes.

THE CLERK: Have a seat up here on the witness stand. State your name and spell your last name, please.

THE WITNESS: My name is Melba Carol Bradstreet, B-r-a-d-s-t-r-e-e-t.

DIRECT EXAMINATION

BY MR. REICHEL:

Q. Ms. Bradstreet, were you present on April 19th when the house was searched?

[69]

A. Yes, I was.

Q. And it was around 7:30 in the morning or so?

A. It was about 7:15.

Q. And I want to ask you about what happened when the officers came to the front door that morning. Okay?

A. Okay. I got ready to take the boys to school. I usually leave the house about 7:30, 7:20, 7:30, depending on whether they have breakfast at school or not. And when I went out the door towards the driveway, I noticed my car was pinned in, and all these officers were kind of swarming all over, and I didn't know what was going on. I was just total shock. And the kids, I didn't know—I looked at the kids, I'm thinking what are they going to think, what's going on. I have no idea what's going on here.

And I said, "I don't know what's going on, but I'd like to take the kids to school." Well, then they said, "We need to look in the children's backpacks before they go to school." So they took each of the

backpacks, and they went through the backpacks. And then they said, "You can take the children to school, but come right back." So I took the kids to school. I said, "Don't worry. We'll find out what's going on. You'll be okay. I'll pick you up this afternoon." So I took the kids on to school, I came back, pulled in the driveway. By this time when I came home, all the officers and Jeff were in the house.

[70]

Q. Are you reading from something?

A. No.

Q. What is it you have in front of you?

A. I didn't look at it.

Q. What is it?

A. It's—I don't know what it was.

MR. REICHEL: Oh, I'm sorry. I thought it was something you brought up there with you. That's our stuff. I'm sorry. I apologize.

May I approach the witness, your Honor?

THE COURT: Yes.

MR. REICHEL: Sorry. She was looking down, and I thought she was reading from something she had brought.

Q. So when you came back from the school, be—

A. So when I came back from the school, I had pulled the car in the driveway, there was nobody outside at this time, and I went on in the house. And at this time they had Jeff in the dining room, because I looked around and there was people all over the place. I mean there was officers. I didn't know who was there. I mean I was just kind of in shock. And I said, "What's going on?" And they wouldn't tell me. And I started to go upstairs, I don't know why, and they said, "Well, you can't do that. Go sit down." And I said, "Well, what's going on?" And they wouldn't tell me. And she says, "I can't tell you anything." And I said, "What are you doing [71] here What's going on?" And this went on all day long. And they never told me what was going on. I never saw a piece of paper. There was nothing. And then I asked if I could do something, and she said, "Well, don't you want to watch TV or something or call somebody?" And I said, "No, I don't want to call anybody. You know, what's going on?" And this is later they said I could call somebody if I wanted somebody to be there with me or something. But I just kept asking what was going on, and they went in the kitchen.

MS. SKIPPER: Objection, your Honor. This is turning into a narrative.

THE COURT: It's a pretty long narrative. Why don't you confine the questions to what you want her to address.

Q. BY MR. REICHEL: So tell the Court, did you ask the law enforcement officers there what was going on?

A. Yes, I did.

Q. Did you ask them that from the minute you got back from taking the—

A. Yes, I did.

Q. Until—

A. I continually asked.

THE COURT: Wait, wait. I know you're a little nervous here. But wait until he finishes the question and then just answer his question.

THE WITNESS: Okay.

[72]

Q. BY MR. REICHEL: You asked them when they first came to the house that morning when you still had the children there?

A. Yes.

Q. And what did they say to you?

A. They said, "We can't tell you anything."

Q. You left to take the kids to the school?

A. Yes.

Q. How much time before you were back at the house?

A. Seven minutes maybe. Seven to ten minutes maybe.

Q. And did you ask them again what's going on?

A. Not until I came back from taking the kids to school.

Q. Did you ask to see—did you say do you have a warrant?

A. No, I didn't. I was so stunned and so startled and so in shock, I didn't know what to say. I saw these people in uniform.

Q. Is it the case that you asked them throughout the time of the search what was going on and what were they there for?

A. Yes.

Q. Did they ever answer that? What did they answer?

A. They just said they couldn't tell me.

Q. Was there a point at which they eventually changed that?

A. No. They just—before me left, they left me the [73] search warrant, copy of it, and an attachment of what they took. They said, "We'll leave you this attachment of all the things that we took." And I didn't even know what they were there for. I still didn't at that point.

Q. And that was when they left?

A. Yes.

Q. And how many pages was the warrant that you got?

A. I think the warrant itself was like one page. And the attachments as far as what they took, the inventory, was several pages. But I don't recall exactly. I have it at home.

Q. And was it folded up when it was given to you?

A. Yes.

Q. Did you have to unfold it?

A. Yes.

Q. What time did the search end, if you remember?

A. About 1:30. They didn't even tell me they were taking the kids. That they had taken them already.

Q. Were you prevented from freely moving in the house during the search?

A. Yes.

Q. And you saw Jeff at the table being interviewed by them?

A. Yes.

MR. REICHEL: Thank you, your Honor. No further [74] questions for Ms. Bradstreet.

THE COURT: Any cross-examination?

MS. SKIPPER: Just very briefly, your Honor.

CROSS-EXAMINATION

BY MS. SKIPPER:

Q. Ms. Bradstreet, do you recognize Inspector Welsh? Would you please stand up. Do you recognize this gentleman from the execution of the search that day?

A. He looks familiar.

Q. Do you recall speaking to him at any time during that day?

A. You know, he looks familiar. I spoke to so many that I don't recall who is who really. He looks familiar.

Q. At some point during that day do you recall someone coming to you telling you that they were going to be taking Mr. Grubbs, that he was under arrest, and they were going to be taking him to Sacramento?

A. Just before they took him.

Q. And do you recall if they told you why they were taking him, what he was under arrest for?

A. No.

Q. They did not tell you that?

A. No.

Q. Okay. At any time, even after he was taken away, after he was arrested and removed from the residence, is it [75] your testimony that no one told you what—

A. No.

Q. Just let me finish the question first.

A. Okay.

Q. Was it your testimony that no one informed you why he was under arrest or what the focus of the search was?

A. No.

MS. SKIPPER: No further questions, your Honor. One more. I apologize.

Q. During the time that you were in the home and they were executing the search, did you ever see any law enforcement officer with his gun drawn pointing it at Mr. Grubbs or anyone else?

A. No.

Q. Did anyone ever point a gun at you?

A. No.

MS. SKIPPER: No further questions.

THE COURT: Anything else?

MR. REICHEL: Nothing further, your Honor.

THE COURT: Thank you, Ms. Bradstreet. You may step down.

Mr. Reichel, doesn't that answer your issue on the search warrant, leaving it there?

MR. REICHEL: It depends on if we're done taking evidence, your Honor, before we argue the case.

[76]

If there's a potential issue, I don't want the government to be able to hear what I have to say, put a witness on who is going to testify exactly to the area that I've brought up.

THE COURT: All right. Well, I'm in the dark. I thought you were claiming that Rule—

MR. REICHEL: 41(d).

THE COURT: 41(d) was violated. Rule 41(d) requires that the officers leave a copy of the search warrant. And that's what she said they did.

MR. REICHEL: There's case law also, your Honor, that says they should show it to the individual at the outset of the search. There's case law that says they should show him the affidavit as well.

THE COURT: Where is that case law?

MR. REICHEL: I believe that's in Gantt, your Honor.

MS. SKIPPER: There is Ninth Circuit case law that does state that you are supposed to show the search warrant at the outset.

THE COURT: Okay. If the Ninth Circuit wants to rewrite the statute, that's up to them. That's fine. I didn't realize that.

MS. SKIPPER: Yeah, there is case law to that effect. Mr. Reichel is correct. It would seem to me, at least with regard to the search warrant issue—

[77]

THE COURT: What does the Ninth Circuit say you're supposed to do if nobody is home when they do the search?

How do they write that into the statute? Do they have an answer for that?

MS. SKIPPER: I believe in that instance, you're supposed to leave a copy at the residence. But if there is someone present, the Ninth Circuit case law is clear that you're supposed to present it to them at the beginning of the search warrant as opposed to the end.

THE COURT: All right. I apologize for having such a silly reading of Rule 41 (d) that I would even suggest that it would suffice to leave it at the end. Obviously, you have to leave it at the beginning. That's what it clearly says.

MS. SKIPPER: I believe the case law is cited in our briefing, and perhaps the rationale may be somewhat convincing to you.

THE COURT: All right. It doesn't make any difference. It's binding.

MS. SKIPPER: With regard to that issue alone, irrespective of Miranda at this point, I'm not sure what difference the grand jury transcript would make on this issue.

THE COURT: We don't know what he said. He might have said something different. He might have said at the grand jury that he left it at the end, in which case it would be clearly in violation of the plain language of section 41(d).

[78]

MS. SKIPPER: You're correct, your Honor. I was kind of assuming, because I was present, I was kind of assuming that knowledge. But you're right. And so that issue would remain open as well as the Miranda issue if Mr. Reichel can find any inconsistency in the agent's testimony today and his testimony before the grand jury.

THE COURT: So I guess you have to do it twice under the reading of 41(d), because it says the officer has to do two things. He has to give the person from whom or from whose presence the property was taken a copy of the warrant, and the Ninth Circuit says you have to do that at the beginning of the search. Then it says you have to give him a receipt for the property taken, so you have to do that at the end of the search. So you can't do it all at once. There has to be two.

MS. SKIPPER: That's my understanding of the Ninth Circuit law. It has to occur at the beginning, and then the receipt has to be given before you leave, or left at the residence.

THE COURT: All right.

MS. SKIPPER: That leaves a factual issue, obviously, of whether or not Mr. Grubbs was given a copy of the search warrant in the dining room; whether he was or he was not.

THE COURT: Well, if he doesn't testify, I don't know that there's any dispute on that.

MS. SKIPPER: He hasn't filed a declaration, your [79] Honor.

MR. REICHEL: I'm fine with the facts, your Honor. I think the facts support—the undisputed facts on the report, I think, support my position.

THE COURT: All right. So do you want to continue this hearing to next Wednesday at the end of the calendar?

MS. SKIPPER: I think that should be fine, your Honor. I'm just thinking if I'm going to be back in town. Yes, I will be back. And we can continue it to next Wednesday. I will be flying out of state Thursday morning. However, I will leave instructions as soon as the transcript is available that it will be both faxed and sent over to Mr. Reichel so he'll have an opportunity to review it before Wednesday.

THE COURT: All right. Then we'll take the rest of the evidence, if there's going to be additional evidence, at that time.

MS. SKIPPER: Your Honor.

THE COURT: Mr. Welsh should be present here in case there's further cross-examination at that time.

MS. SKIPPER: I will have him present, your Honor. Should Inspector Esteban be present as will? He didn't testify before the grand jury.

THE COURT: Not unless you want him to testify.

MR. REICHEL: I don't think I need him, your Honor.

THE COURT: So it would be Mr. Welsh and any other [80] witnesses that Mr. Reichel is going to call, and then argument on the law.

MR. REICHEL: I know Ms. Skipper is going to be out of town so it's a little unfair to her, but if I filed something to kind of succinctly restate my points and point to some of the applicable law from the facts I think that are already in the record and not in dispute.

THE COURT: Why don't you do that, because that's what you'll be doing anyway, and it will just give me a head's up on what your arguments are. I was being somewhat factitious here about the rule, but it would help to have you point to the—

MR. REICHEL: It isn't in the text, your Honor.

THE COURT: No, I know. It would help to have you point to the parts of the case law that you want me to focus on.

MS. SKIPPER: In fairness to the government, if he could have that available in my office on Monday so that when I get in on Tuesday morning, I'll have an opportunity to read that, I would appreciate it.

THE COURT: All right. So you give it to me and the U.S. Attorney's Office by Monday.

MR. REICHEL: Yes, your Honor.

THE COURT: All right. Anything else at this time?

MR. REICHEL: That's it for today.

[81]

THE COURT: Thank you.

MS. SKIPPER: Thank you, your Honor.

MR. REICHEL: Thank you very much, your Honor.

(Proceedings were concluded.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

KELLY O'HALLORAN, CSR 6660

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. Cr. S-02-164

UNITED STATES OF AMERICA, PLAINTIFF

v.

JEFFREY GRUBBS, DEFENDANT

REPORTER'S TRANSCRIPT

FURTHER HEARING RE MOTION TO SUPPRESS

WEDNESDAY, OCTOBER 23, 2002

BEFORE THE HONORABLE WILLIAM B. SHUBB,
CHIEF JUDGE

Reported by: KELLY O'HALLORAN, CSR #6660

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[1]

SACRAMENTO, CALIFORNIA

WEDNESDAY, OCTOBER 23, 2002, 9:00 A.M.

THE CLERK: Calling criminal case 02-164; United States versus Jeffrey Grubbs. This is on for further evidentiary hearing, your Honor.

MS. SKIPPER: Good morning, your Honor. Camil Skipper for the United States.

MR. REICHEL: Good morning, your Honor. Mark Reichel with the Federal Public Defender's Office. Mr. Grubbs is present and out of custody.

THE COURT: Are there any other witnesses to be called in this hearing?

MR. REICHEL: Well, your Honor, I don't know if the Court got a chance to look at my pleading that was filed Monday. And I'll get to the point. One of the important issues in this case was what was served on the Grubbs' residence that day. And Ms. Grubbs testified—or excuse me, not Ms. Grubbs—Ms. Carol Bradstreet testified at the evidentiary hearing that she received a copy of the search warrant that day at the end of the search warrant. She testified that she received a one- or two-page document, and that's all that she got. She also testified that she has it at home, and she didn't bring it with her. The next day she delivered to the Federal Defender's Office what she received. [2] And it is a folded up search warrant. I have it with

me. I brought it here today. It's in the envelope she brought it by with. And it does not have the affidavit attached to it. It's a copy the warrant itself. A copy of the search warrant. It doesn't have the affidavit in support of it, which is I think about 25 pages. But the Court and the government need to look at it because there are holes missing where clearly there was a staple in it at some point. Ms. Bradstreet is here today to testify about the circumstances of that. The proffer would be that she received it, she put it in the house, she didn't touch it, didn't alter it, didn't tamper with it in any way. And then after she testified, she told me she would bring it to the office the next day, and that she did. And that's the exact condition she received it in.

THE COURT: Does your case law stand for the proposition that the affidavit has to be left also?

MR. REICHEL: I think it's very important that—I don't know if the case law says the affidavit has to be left, but the case law is clear that the affidavit has to accompany the warrant when it's shown to the individuals at the premises. And the case law is clear that the affidavit has to attach—excuse me—has to accompany the warrant, especially if it's an anticipatory search warrant.

MS. SKIPPER: That's not the case law, your Honor.

THE COURT: Sometimes the affidavit is sealed.

[3]

MS. SKIPPER: I'm sorry. Counsel is simply wrong. I believe that he's relying, or at least what he cites in his brief for the preposition that 41(d) requires that the affidavit accompany the search warrant is the Gantt case. And that's simply not what the Gantt case says. What he's relying upon is footnote 7 in the Gantt case which does require that at the presentation of the affidavit, in order to comply with Rule 41(d), the officer should have shown them attachment A.

Defense counsel in his brief in parentheses after "attachment A" says "affidavit," I believe. But that's not what attachment A is. If you look at the Gantt case, which I did, the Gantt case clearly identifies attachment A as the two-page typed list of items to be seized, including the specific kind of envelopes, paper, and postage stamps, et cetera. That's what had to be attached.

THE COURT: Well, let's find out, because we're behind today and we have a jury waiting in another case. If there's going to be any other testimony, let's take that now so that your witnesses don't have to stay around, and then we can decide how we're going to deal with these legal questions.

MS. SKIPPER: I'm not sure there needs to be any testimony, your Honor. We'll concede the fact that the affidavit wasn't presented to either Mr. Grubbs or Ms. Bradstreet.

THE COURT: Why don't you see if you can enter into a [4] stipulation, we'll put that on the record, and then you can decide whether there's any other evidence to be presented.

MR. REICHEL: That's fine. I think what she just said is they would concede that the affidavit wasn't presented to Mr. Grubbs and it wasn't presented to Ms. Bradstreet or left at the residence, is a stipulation I would enter into.

THE COURT: Is that the stipulation?

MS. SKIPPER: Yes, your Honor. We'll concede that.

THE COURT: Then the Court will accept that stipulation; i.e., that the affidavit was not presented to Ms. Grubbs, Mr. Grubbs, or left at the premises.

MS. SKIPPER: Yes, your Honor. It was not.

THE COURT: Then do you want to file a written response to his most recent brief if there's some legal issues you want to address?

MS. SKIPPER: I'll be happy to do so, although I have the Gantt case here with me.

THE COURT: Well, is the issue whether the affidavit has to accompany the search warrant? Is that the issue?

MS. SKIPPER: That's the issue as defense counsel framed it. He has said that. Gantt requires that at the time the search warrant is presented,

the affidavit is to be attached. And he cited Gantt, page 1001, footnote 7, for that proposition. And what I'm saying is that he has misinterpreted the case law, because they say attachment A had [5] to have been attached, but the case does not identify the affidavit as attachment A. It identifies the list of items to be seized as attachment A, and that was attached to the search warrant in this case. The affidavit need not be presented.

THE COURT: Rule 41(d) has existed in essentially the same form for several decades, and I would think there would be some case law that would clearly set forth whether the affidavit has to accompany the search warrant. My personal understanding based on experience is that it seldom does, because I think oftentimes the affidavit is under seal. There are many times that for purposes of safety and other reasons officers don't want, and the United States Attorney doesn't want, whoever happens to be at the house to read affidavits in support of a search warrant. So I'd like to have some clear law which I think must exist out there on this question, if that's the issue. Is that the issue, Mr. Reichel?

MR. REICHEL: That's one of the issues. We do have about six issues, I believe, in the air on this case. But that is one of the issues, yes, your Honor.

THE COURT: Why don't you file something on that, Ms. Skipper.

MS. SKIPPER: I will, your Honor.

THE COURT: Do you want to put it over two weeks?

MR. REICHEL: Yes.

[6]

THE COURT: Mr. Grubbs is not in custody, is he?

MR. REICHEL: No.

THE COURT: All right. So you have no objection to putting it over two weeks?

MR. REICHEL: No, your Honor.

THE COURT: Any objection?

MS. SKIPPER: No, your Honor.

THE COURT: All right. Let's do that. If there's anything else you want to respond to in this supplemental brief, you can do that at the same time. Right now we've got the original motion and the government's opposition, and then we've got the defendant's reply which was a package that the Court had at the last hearing. Now we've got a brief after hearing. So the government would have the right to respond to that brief without going back and just reiterating everything that's in your previous papers.

MS. SKIPPER: That's fine, your Honor. I had prepared my arguments in response to the brief filed after the hearing. I will be glad to put those in writing. I can have those on file to the Court by Monday.

THE COURT: All right. So we'll hear this on November 6th at 9:00 a.m.

MR. REICHEL: Thank you very much, your Honor.

THE COURT: All right.

MS. SKIPPER: What time will that hearing be, your [7] Honor?

THE COURT: 9:00 a.m.

MS. SKIPPER: Thank you.

(Proceedings were concluded.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

KELLY O'HALLORAN, CSR 6660

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. Cr. S-02-164

UNITED STATES OF AMERICA, PLAINTIFF

v.

JEFFREY GRUBBS, DEFENDANT

REPORTER'S TRANSCRIPT

FURTHER HEARING RE MOTION TO SUPPRESS

WEDNESDAY, DECEMBER 11, 2002

BEFORE THE HONORABLE WILLIAM B. SHUBB,
CHIEF JUDGE

Reported by: KELLY O'HALLORAN, CSR #6660

APPEARANCES

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[1]

SACRAMENTO, CALIFORNIA

WEDNESDAY, DECEMBER 11, 2002, 9:00 A.M.

THE CLERK: Calling criminal case 02-164; United States versus Jeffrey Grubbs. This is on for further evidentiary hearing, your Honor.

MS. SKIPPER: Good morning again, your Honor. Camil Skipper for the United States.

MR. REICHEL: Good morning, your Honor. Mark Reichel with the Federal Public Defender. My client, Mr. Grubbs, is present out of custody.

THE COURT: I think Mr. Grubbs can probably be seated. We're going to hear the rest of the arguments at this time. Ms. Skipper, have you had an opportunity to review the latest points and authorities filed by Mr. Reichel?

MS. SKIPPER: Yes, your Honor. I appreciate the opportunity to do so.

THE COURT: All right. So how do you wish to proceed today?

MS. SKIPPER: I'm prepared to argue, your Honor.

MR. REICHEL: I agree, your Honor. I'm prepared to argue. I think the pleadings establish everything that's before the Court. I'd like to be heard in argument.

THE COURT: All right. Let's break it down by the arguments so that we're not all talking about different things [2] at once.

Which issue or which part of the motion do you want to discuss first?

MS. SKIPPER: Perhaps we could move sequentially through the issues that were raised by Mr. Reichel in his pleadings.

THE COURT: He raises all the issues in his pleadings. I want to take them one at a time.

MS. SKIPPER: Right, exactly. Move sequentially through those separate arguments.

THE COURT: Which one do you want to take first?

MS. SKIPPER: The first issue that was raised was whether or not the magistrate judge's finding that the videotape contained child pornography was clearly erroneous. And that has to do with whether or not the magistrate judge had a substantial basis for concluding that probable cause existed to believe that the videotape that was delivered to Mr. Grubbs' home contained child pornography.

As stated in the government's brief, and we believe that it does, in the affidavit that was supplied to the magistrate judge, Inspector Welsh clearly states that he viewed the videotape personally, he judged the age of the minor to be between 10 and 13, and that he observed certain sexual activity which is detailed in the brief as well as the affidavit. He identified himself as a child

sexual [3] exploitation specialist for the Northern California Division of the United States Postal Inspection Service. And he stated that he received training in identifying and approximating the ages of individuals depicted in the pornographic materials.

Now, in the Ruddell case which—

THE COURT: Well, and you also have the e-mails that went back and forth where they were describing this as child pornography.

MS. SKIPPER: That is correct.

THE COURT: Saying that if this person is over ten years old, that he'd be surprised.

MS. SKIPPER: That's correct, your Honor. We believe that all that points to the fact that the magistrate judge had probable cause to believe that that videotape that the agent was going to be providing to Mr. Grubbs had child pornography on it. And a similar affidavit in the Ruddell case was found to be sufficient. The postal inspector in that case made similar representations about her experience, the fact that she had viewed the videotape, and she was explicit—not as explicit as Mr. Welsh was, but explicit in identifying what appeared on the tape. We believe that establishes probable cause.

THE COURT: What's the next issue?

MS. SKIPPER: Well, a related issue is whether—having to do with morphed images, and we also believe that [4] Inspector Welsh was

competent for purposes of establishing probable cause that those images were not morphed.

MR. REICHEL: I would submit that argument, your Honor.

MS. SKIPPER: Okay.

THE COURT: All right.

MS. SKIPPER: The next issue is whether there was probable cause to have seized items other than the videotapes that were identified in the search warrant. And the government has already stated that the government will not be offering that proof at trial, but that they will ask that it be considered relevant conduct at the time of sentencing.

We did make a substantive argument as well in our brief. However, because we have not charged possession, we do not believe we need to go any further into that.

THE COURT: Let's stop there. Do you have an argument on that?

MR. REICHEL: Yes, your Honor. It makes it a defective warrant, I believe.

THE COURT: Well, I read your brief, and I went and looked at the Weber case because that's the one you cited the most and relied upon the most for this argument. In Weber, at the very end of the opinion, Judge Fletcher says, "The district court should have suppressed the evidence seized pursuant to paragraph 2 of the warrant." Then it says [5] "reversed." But paragraph 2 of the warrant, if

you look at page 1340 of the opinion, is the paragraph that talks about books, magazines, pamphlets, et cetera, et cetera. And paragraph 1 was the paragraph that referred to the four sets of photographs that were the ones that would arrive in the controlled delivery. So what the court said there was the only thing that the district court should have suppressed was the other things. And the court does not say that the district court should have suppressed the items that were the subject of the controlled delivery. So if the government in this case doesn't want to offer the evidence other than what was the subject of the controlled delivery, there's nothing to suppress even if I agree with you.

MR. REICHEL: I think under Judge Fletcher's opinion, it seems to me that the last paragraph suggests that you can sever out portions that are overbroad.

THE COURT: That's what it suggests.

MR. REICHEL: Portions that don't have probable cause to support a search for those objects.

THE COURT: It doesn't suggest that. It holds that.

So do you have anything else to say on that?

MR. REICHEL: That may be the death knell to that argument, your Honor.

THE COURT: All right. What's your next argument, [6] Ms. Skipper?

MS. SKIPPER: The next issue we can address at this point is an issue that is raised in defendant's last filing, whether or not the government obtained valid consent to search the defendant's computer and digital storage material.

THE COURT: But you're not going to offer that.

MS. SKIPPER: We were not going to offer that.

THE COURT: Okay. So that's the same reason. That's moot.

MS. SKIPPER: Yes.

THE COURT: Okay.

MS. SKIPPER: The next argument is whether the search warrant is a deficient forthwith warrant because it does not require commission of a crime before execution of the warrant is triggered. And here there are really two issues that come up. Number one, the anticipatory nature of the warrant. And, second, the triggering, the fact the triggering event was not on the face, and whether that oversight is fatal to the warrant.

Here, the Hotal case is the seminal case on this issue. It's the government's argument that, number one, Hotal does not say that the triggering event need be on the face of the warrant. It certainly should be, and the government concedes that it was an oversight that it was not. But Hotal says it doesn't have to be. There is a way to cure that [7] error.

And what Hotal says is that the necessary conditions for the triggering of the warrant must be an attachment, and those attachments must be in the possession of the executing officers at the site to guide them in their actions and so that they can provide information for the person whose residence is being searched.

And in this instance, although the triggering event was not on the face of the warrant, the triggering event was recited twice in the affidavit. And contrary to what the defendant says, there is evidence that the affidavit was at the site. The defendant says that there was overwhelming evidence that it was not at the site. And he bases that on the fact that the affidavit was not presented to Mr. Grubbs or to his wife, and that it was not mentioned in the report that the affidavit was at the site.

Actually, Inspector Welsh testified on the stand that the affidavit was at the site. That is in his grand jury testimony. It's at page 52, lines 8 through 10. And the members of the search team were aware of the content of the affidavit because Inspector Welsh testified that the members of the search team were required to read the affidavit the night before they executed the search. And that's at Inspector Welsh's testimony, page 52, lines 11 through 21.

THE COURT: Do you think that satisfies the Hotal [8] requirement even though it may not have been present? I know you're arguing that it was present, but suppose for purposes of argument that the affidavit wasn't present, but the unequivocal testimony was that the agents had read it before

they went out to the scene and were aware of the triggering event.

MS. SKIPPER: Under Hotal, it doesn't seem so.

THE COURT: Doesn't seem what?

MS. SKIPPER: It doesn't seem that that would satisfy. There are other cases in the Ninth Circuit where it would seem to militate the other direction, but Hotal plainly states that there was no evidence in the record that the affidavit had been at the site of the search. And for that reason, Judge Reinhardt found that it wasn't valid.

But in this instance, there's no contrary evidence to say that it wasn't. All we have is evidence that it was.

THE COURT: Well, there's an argument that it wasn't. There's an inference they want the Court to draw that it wasn't. But I don't think there's any dispute if it was sufficient to say that the officers knew the triggering event. I don't think there's any dispute that they knew it.

MS. SKIPPER: They did know it. And the inference that the defendant's asking to draw is an improper one. First, the fact that it was not listed in a report means nothing. That is not the sort of information that would end [9] up in an investigator's report, that yes, he had a copy of the affidavit at the site. I wouldn't expect it to be there, and the fact that it's not there means nothing. And the fact that it wasn't presented to Mr. Grubbs or to

his wife, again, means nothing. Because as I will argue next, I believe, that the affidavit need not have been presented to them anyway. So just because the affidavit wasn't presented doesn't mean anything.

But we do have the testimony of Inspector Welsh that the affidavit was indeed at the site.

MR. REICHEL: Before we leave—

MS. SKIPPER: That's the only evidence on that point.

THE COURT: Okay. Mr. Reichel, do you want to respond to this?

MR. REICHEL: Yeah. I'd like to stop there and talk for a minute about Hotal. Specifically what happened here, and under Hotal, the law of Hotal, makes this a defective warrant again. And I'll tell you why.

The government correctly cites the dual purposes, that in an anticipatory search warrant case, the affidavit should be, and I'm going to use the term be married, to the search warrant, and it should be present on the site. There's two reasons. One, to guide the officer's discretion, which the government identifies. And the second reason is so that the citizen whose home is being searched has the opportunity to [10] view it, review it, and understand whether or not the police are exercising lawful authority, whether they're exceeding their bounds, whether they should even be there.

And in this case there's no dispute that Mr. Grubbs—well, there's no dispute, in my opinion, that this is what actually happened. And if you look under the contours and the parameters of Hotal, that in an anticipatory warrant case where the warrant face doesn't have the triggering event, but the triggering event is in the affidavit, that under Hotal what happens as follows, as I'll explain to the Court, makes it defective.

First of all, Inspector Esteban testifies that as soon as they got to Mr. Grubbs, he made several comments about what's going on, what's happening here. Inspector Esteban testified next that it was approximately 30 minutes later at a table that the search warrant was supposedly given to—set on the table in front of Mr. Grubbs folded in three so that you could only see the search warrant itself.

There's no dispute from Mr. Esteban as well that Ms. Grubbs or Ms. Bradstreet, his wife, the occupant of the house, was present, was in another room, is asking what's going on, what's going on here, I need to know what's going on. And then Ms. Bradstreet testified, and it's uncontradicted, that immediately she asked what was going on when they had arrived at the residence. This is in the [11] transcript of the testimony. That she went for seven to ten minutes and returned, immediately asked what's going on, continued to ask what was going on. They told her, and this is her testimony in the transcript, repeatedly they couldn't talk about it, they'll tell her later, things like that. And at the very end of the search, she was given a search warrant.

THE COURT: But none of this testimony established that they gave either her or him the affidavit.

MR. REICHEL: Correct, your Honor. And, in fact, the government has conceded here in this court that the affidavit was not given to Mr. Grubbs, and the affidavit was not given to Mrs. Bradstreet.

THE COURT: So the legal issue is squarely drawn here as between the two arguments that each of you respectively are making.

Ms. Skipper, you're arguing that as long as the affidavit is there and the officers know of its limitation of the contingency in the affidavit, that is sufficient.

Mr. Reichel is saying it is not sufficient unless the affidavit is also given to the defendant because there are two purposes for requiring the triggering event to either be in the warrant or the affidavit. One of them is the one that you acknowledge. The officers have to know. But the other one Mr. Reichel says is so the defendant or the person at the place knows why the officers are there and can make a [12] determination by looking at either the face of the warrant or whatever is attached to it that they're in the right place at the right time.

MS. SKIPPER: In fact, what the Hotal decision says is that the second reason is so that the officers can provide information to the person whose property is being searched. What Hotal doesn't say is that you give them a copy of the affidavit in the

instance where the triggering event is not on the face, but it is to be present at the site so that you can give information to the individuals whose property is being searched.

THE COURT: So you can give what information though?

MS. SKIPPER: Answer their questions that they may have about why it's taking place, the triggering event, but it doesn't say that you must give them a copy of the affidavit. There are circumstances—

THE COURT: But does the law say that you have to give them a copy of the warrant?

MS. SKIPPER: Yes.

THE COURT: And isn't the reason that you have to give them a copy of the warrant so that they may see that officers are in the right place at the right time doing the right thing?

MS. SKIPPER: Yes.

THE COURT: Okay. If you concede that, then the [13] person at the home has to rely upon some sort of an oral statement from the officer about the condition precedent or they wouldn't know it; right?

MS. SKIPPER: Yes. If they ask a question, and the officer has the affidavit present at the site. Right.

THE COURT: But if you acknowledge the first question, and maybe you acknowledge more than

you intended to, but if you acknowledge that the purpose of the requirement that you give the person a copy of the affidavit is so the person can look at the—I mean strike the affidavit. Strike what I said.

If you acknowledge that the purpose of the requirement that the officer give the person a copy of the warrant is so the person can look at the warrant and thereby determine that the officers are in the right place at the right time doing the right thing, then they can't make that determination where the condition precedent is not on the warrant unless they also have the affidavit with it. See, that's the argument.

MR. REICHEL: Your Honor, I think the McGrew opinion—

THE COURT: Let me hear your answer on that.

MS. SKIPPER: Before I address the McGrew opinion, which the government argues is not helpful on this matter, the search warrant itself tells the individual that the officers have authority to search the residence, to search where, tells [14] that they have authority to search the residence. And the attachment, this is attachment B, tells the individual what the officers have authority to seize.

The triggering event is, in essence, the thing that gets the ball rolling in this instance. This warrant had the word "anticipatory" written in at the top, which the Court can plainly see, and which, as

I've already acknowledged, I wrote myself, because it was not already on there.

The triggering event information was something that certainly if they had asked that information could have been supplied, they could have been shown that portion of the affidavit.

THE COURT: But why do you need to ask? If that was the rule, then you wouldn't have to give them a copy of the warrant. You could just say well, if they ask, we can tell them what's in the warrant.

Let me give you an analogy and tell me what you think the law is here. There are daytime only search warrants; right?

MS. SKIPPER: Yes, your Honor.

THE COURT: Now, suppose you have a daytime only search warrant, but it wasn't on the face of the warrant. It was only in the affidavit. If the affidavit said I'm seeking permission to search only in the daytime, but it didn't appear on the face of the warrant, would that be valid if you didn't [15] present the affidavit to the party at the time you presented yourself to make the search?

MS. SKIPPER: I'm thinking about that, your Honor. If the search was conducted during the day and in all other ways it obeyed the terms of the authority by the magistrate judge?

THE COURT: Right.

MS. SKIPPER: I'm honestly not sure, your Honor.

THE COURT: It's a similar situation, because there the homeowner wouldn't be able to tell by looking at the face of the warrant that the officers were only entitled to be there during the day, but, in fact, they were only there during the day. So in one respect, you say no harm, no foul.

MS. SKIPPER: But I guess what's keeping me from expressing a firm opinion on that with regard to the hypothetical that you put forward is that I keep harkening back to the fact that we have a decision that applies specifically to anticipatory search warrants, which is what we have in this case.

THE COURT: Well, I know, but you have other case law that applies to daytime only search warrants, and I'm wondering if maybe you can get some insight from the law with respect to those search warrants.

MS. SKIPPER: Unfortunately, I haven't read any of those.

THE COURT: I just see the argument on both sides. [16] Obviously, there is a purpose for the requirement that the warrant has to be presented to the person at the residence. And obviously, it seems to me, the purpose of that is so the person can look at the warrant and know that the officers are rightfully there.

MS. SKIPPER: Yes.

THE COURT: For example, if they were at the wrong house, the person would be able to say, wait a minute, wait a minute, this is the address of the place next door. Or if it said that they could only be there during the day, wait a minute, wait a minute, this is night, you're in the wrong place. On the other hand, if it said it could only be done after a delivery was made, the person could say, wait a minute, wait a minute, the delivery hasn't been made.

So that's the reason for the requirement.

MS. SKIPPER: Well, your Honor, I'm just left with the Hotal case. And this is a 1998 case. The need to present warrants to individuals is well known at that time, yet in the Hotal case, Judge Reinhardt does not require that the affidavit be given to the homeowner.

THE COURT: But he doesn't say that it does not have to be given. He's just silent, isn't he?

MS. SKIPPER: In fact, what he says is there needs to be evidence that the affidavit was at the site of the search to guide the officers or to provide information to homeowners.

[17]

THE COURT: I know. But the reason he reversed it is because there was no evidence that it was there. So he doesn't get to the question of whether it has to be presented to the person or not. He reverses because it's just not ever there. He

doesn't deal with the question of if it is there, whether it has to be presented to the homeowner.

MS. SKIPPER: The government would argue at this point that if it did have to be presented, we would expect to see that in the decision.

THE COURT: No, I don't think so. It would be dicta at that point because it wasn't even there at all, so it obviously couldn't be presented.

Maybe I better see if there's anything in the language of Hotal that supports you. There's nothing in the holding that supports you. Maybe the language will.

MS. SKIPPER: Well, in that regard, I would simply point the Court to the Ruddell case which is cited with approval in Hotal. And in—I'm sorry. Well, it's discussed at some length in the government's opposition brief, so I would refer the Court to that.

THE COURT: All right.

MS. SKIPPER: The specific discussion of the connection between Hotal and Ruddell and Hotal's adoption of Ruddell.

There is another issue with regard to the search.

[18]

MR. REICHEL: Before we leave the Hotal argument, as we call it, may I be briefly heard?

THE COURT: Yes.

MR. REICHEL: Thank you. I think that anticipatory warrants are different. And I think any reviewing court that would see this would agree with me that under the Fourth Amendment, it says no warrant shall issue but upon probable cause. And I think that's the important thing, that there now exists probable cause. And in this warrant, it was a forthwith warrant, and it said shall search now, and I believe there's evidence of a crime, and you shall search forthwith. But at the top, it said "anticipatory." And so I think that's kind of confusing at that point.

And I think in anticipatory warrant cases, the triggering event, if it is not on the face of the warrant and if it is instead on the affidavit and, in fact, as in this case, the face of the warrant says "forthwith search," I think there can be no stronger case for the requirement that be given to somebody at the very outset of a search for the reasons the court identified, and as well no oral pronouncements by the officers who are executing it as to the triggering event to why they're there.

THE COURT: Well, it may well follow from Hotal, but it's taking it one step further than the court either did or had to take it in Hotal.

[19]

MR. REICHEL: I agree.

THE COURT: Okay.

MS. SKIPPER: I would simply mention, your Honor, dealing with the issue of the face of the war-

rant saying "anticipatory" and then the "forthwith" language appearing below, that is exactly the situation in the Ruddell case, and the Ninth Circuit found that that was still an anticipatory search warrant.

MR. REICHEL: And, your Honor, my view of the facts are that whatever happened the day of the search is one thing, but I filed an opening brief that said the search warrant affidavit wasn't present, it wasn't provided to the Grubbses, and it wasn't given to them at the outset. The agents then reviewed that motion, filed a declaration. The declaration said we left the search warrant at the site. And that was the extent of the declaration. So then, your Honor, I filed a reply motion which the officers again reviewed, they appeared and testified, and at no time did they ever say that they gave the affidavit at the outset of the search, leave it behind, or present it to Mr. Grubbs.

And I think the real inference in the facts is that nothing was shown, and, in fact, at the very end of the search, only the search warrant face was given to Ms. Bradstreet.

THE COURT: All right. Well, we're still talking [20] about this question of the forthwith and the triggering event.

MR. REICHEL: But that actually is relevant for the Hotal argument, whether it was married, as I call it, married to the warrant. And I think the real inference is that it was never mentioned in any report that an affidavit was there, or that an affidavit accompanied the warrant. It was never

mentioned anywhere until when it became painfully obvious that the omission of such had strong legal significance.

THE COURT: All right. Are there any other issues now that you want to address?

MS. SKIPPER: I believe that Mr. Reichel misspoke. Because he did not previously argue that the affidavit—well, I'm sorry. Just a moment, please. Well, actually I dealt with that in my brief. I won't get into that right now.

But there is another issue. And that is whether this search warrant allowed execution of it before the videotape had entered the residence. And that goes to whether or not this is a forthwith or an anticipatory search warrant.

THE COURT: But it wasn't executed before.

MS. SKIPPER: It was not.

MR. REICHEL: I'm sorry?

THE COURT: This is the same issue really.

MS. SKIPPER: The next issue is whether or not there was a Rule 41(d) violation in either the inspectors not having provided a copy of the search warrant to the defendant or the [21] timing of their providing the search warrant to the defendant. Certainly Gantt requires that the search warrant be provided at the beginning of the search. And in this instance, the testimony was that it was provided about 30 minutes after the first contact with Mr. Grubbs. Inspector Welsh testified that during that

30 minutes, many things were taking place. They were getting the children off to school so that Mr. Grubbs' wife could take them. They also were securing the residence. They were taking photos. They were sketching the house. And they also were required to secure some narcotics paraphernalia that was found during the first walk-through of the residence.

As soon as they were able to sit down at the table to talk with Mr. Grubbs, the testimony is that Inspector Welsh provided a copy of the affidavit—or of the search warrant to Mr. Grubbs, and there is no contrary testimony in the record. And Mr. Grubbs has not supplied a declaration or any testimony—

THE COURT: And there was no search before they provided it; is that right?

MR. REICHEL: Not in my opinion, your Honor. I think the evidence is clearly, clearly to the contrary. They seized the residence immediately, your Honor. They went into the residence, and they photographed it. They went into the residence, and they did a protective sweep. They went into the residence, and they drew diagrams of the residence. They [22] went into the residence, and they were searching the residence immediately, your Honor.

MS. SKIPPER: All of those things take place prior to an actual search.

THE COURT: Well, I'll have to go back and look at my notes here now. This hearing took place

about a month ago. I've done a few things since then.

MS. SKIPPER: Inspector Welsh's testimony on page 47 may be helpful in this regard.

THE COURT: You had this testimony typed up, didn't you?

MS. SKIPPER: Yes. I do have a transcript.

THE COURT: So let's take a look at it.

MS. SKIPPER: I'm handing it to your clerk.

THE COURT: No, I have it. What page is it on? Somebody attached it. Didn't you attach it?

MS. SKIPPER: I had forgotten that I attached that.

THE COURT: What page?

MS. SKIPPER: 47, 48, your Honor, of the testimony.

THE COURT: All right. Where was the testimony, Mr. Reichel, that you thought established that they were searching the house?

MR. REICHEL: I haven't looked at Inspector Welsh. I begin on page 23, which is Inspector Esteban, who says exactly that. Page 23, your Honor, of the transcript.

[23]

THE COURT: I guess we need to establish whether the protective sweep is part of the search, because protective sweep, by definition, is something that has to be done quickly, and you don't sit down with a person and show them a warrant and then do a protective sweep. If you do, you're dead before you have a chance to go through this.

MR. REICHEL: I agree, your Honor. I have to tell you, I think given the opportunity, I really don't think that this can be much of a factual issue in dispute. There are nine officers there. And as soon as they got there, the police reports say they entered the house to photograph it and to sketch it. And I'll go through the transcripts, but I think that this really—the record truly does not belie that there was not an entry, there was not a seizure, and there was not a search of that premises immediately.

I think the facts support the defendant's position. I will go through the police reports, I will go through Inspector Grubbs' testimony—I'm sorry, Mr. Welsh. I really don't think that seriously should be disputed. There's several officers in that residence immediately, and I really don't think that's subject to reasonable dispute. They didn't stay outside. I mean it's in their reports that they immediately photographed and sketched the residence and did a protective sweep. And one of the first things I did was ask Inspector Esteban that. He acknowledged that.

[24]

And I'll look in Inspector Welsh's, but—

THE COURT: Well, that's the issue, isn't it, under Gantt?

MR. REICHEL: Yes

THE COURT: As I recall, I was not aware of this requirement when we were at the last hearing. I didn't know that the warrant had to be presented before they did the search. And I asked Ms. Skipper, I said, well, isn't that enough if they presented the warrant to the woman before they left? Doesn't that answer the question? And she said no. We acknowledge that the warrant has to be presented before the search.

MS. SKIPPER: At the commencement of the search, your Honor.

THE COURT: So the dispositive issue here is whether they were doing the search before they presented the warrant; is that right?

MR. REICHEL: Yes.

THE COURT: Is that right, Ms. Skipper?

MS. SKIPPER: Yes, your Honor.

And we contend that the activities that took place are things that are normally done in anticipation of the execution, of the search. Because they have to secure the residence, they perform a protective sweep, there were other things that they needed to do during that protective sweep. And also in [25] Mr. Grubbs' pocket, they found drug paraphernalia they had to secure and dispose of.

There was also the issue of the wife and the children at the home.

And before they conduct the search, they must ensure that they secure the residence in its original state. And they do that also by taking pictures to ensure before they search anything and before they take anything apart and before they look for anything, and that's considered part of the securing of the residence.

THE COURT: If you take a picture of everything, isn't that doing a search? I can understand a protective sweep, because it's silly. Nobody but an appellate court would suggest that you have to sit down with them and go over the warrant before you do the protective sweep, because the whole purpose of the protective sweep is to protect you. So I can understand why you have to do the protective sweep before you give them the copy of the warrant. But if they're going through taking all these pictures, why can't they show him the warrant before they go through and take all these pictures?

MS. SKIPPER: Well, you could do that at the same time as well. But what we argue in this case is that—and when they were taking the pictures, they're not taking pictures of things they intend to seize. They're not taking pictures of specific items that they believe match up with items that they're allowed to seize under the warrant. At that point [26] they were just taking pictures of the residence as a whole.

THE COURT: Why do you have to do that before you show him the warrant?

MS. SKIPPER: I don't think it's necessary that you have to do it before you show them the warrant, but I don't believe that doing so before the inspector sat down with Mr. Grubbs and showed him a copy of the warrant is a violation of Rule 41(d).

THE COURT: Show me what you're talking being about here, Mr. Reichel.

MR. REICHEL: Thank you very much, your Honor. I think the facts really can't be subject to much dispute. Begin, as I said, with Inspector Esteban has said they went in right away. But if you look at page 47 of Inspector Welsh's testimony—

THE COURT: That's what I was looking at just a minute ago.

MR. REICHEL: Your Honor, I believe strongly it is a search, and it is a seizure of a residence when, to wit, they go in, they talk to the wife, explain why they're there, make sure the kids go off to school, check their backpacks, which is a search, your Honor, anyway. "Photographs were taken of the house, sketches, hand-drawn sketches of the house had to be made. It took a while to clear things away from the table. We had to deal with narcotics paraphernalia" and so forth. [27] "So all told, I think all those preliminaries took about 30 minutes."

Also, your Honor, if you move to—

THE COURT: Look, if you take these one at a time, the only thing that really concerns me is taking the photographs, because you've got kids that are about to leave the house. Now, if you let them leave the house before you do the search and they've got backpacks, then they could be walking out with something that you're looking for.

MR. REICHEL: Your Honor, I believe that's probably lawful, and I'm not going to argue that point.

THE COURT: Okay. So you agree with me that what really is of concern here is taking photographs inside the house.

MR. REICHEL: No, your Honor. I think there are exceptions to search warrant requirement. But looking in a backpack, whether that's lawful or not, your Honor, is still a search, it's still a seizure. And I just can't imagine that the state of the case law under the Fourth Amendment is officers can be present in the house for 30 minutes and do all those things and that not be a search.

THE COURT: How about this. You walk into the house to do the search, and there's a dozen people in there. And so you start to do the search, and immediately a dozen people start walking out with bags. Now, you've got two choices. [28] You either do what the circuit courts would like you to do, which is let all those people leave with the bags and then do your search, which is sort of like going over to Iraq and doing one of those searches over there and not looking in the bags, or you look in the bags, but you don't have the time to sit down and go

over the search warrant with the people before you look in the bags because the people are on their way out.

MR. REICHEL: You have to go over the search warrant with them, your Honor. These are different cases, but there are a lot of cases that talk about detaining people on a couch. They can't leave if they're leaving with bags when you're going to execute a search.

But I submit to the Court that I believe it's very clear—I don't have case law on it, but when they're inside there and there are six officers inside, and in this case there's children and Ms. Grubbs outside, they approach them outside the residence.

THE COURT: I suppose you're right. The thing the circuits probably want you to do is the more unreasonable thing. But I think you're right. What the circuits want you to do is detain the kids rather than let them go. What makes sense is to let the kids go. But what the circuits probably want you to do is to detain the kids, because you can't do a search until you go over the warrant with the person. And looking in the bag in order to let the kids go is a search, [29] isn't it, Ms. Skipper?

MS. SKIPPER: Well, your Honor, they did so, as Inspector Welsh said, for safety reasons. But yes, they did check their backpacks for the purpose of allowing the children to get to school.

THE COURT: But that's not safety reasons. That's to make sure that the evidence isn't being taken out of the premises.

MS. SKIPPER: I was just describing Inspector Welsh's testimony.

THE COURT: Yeah, but that's not safety.

MS. SKIPPER: The fact is what they were trying to do was to allow the children to get to school on time. We believe that that was a reasonable thing to do under the circumstances.

THE COURT: But they didn't say they did it for safety reasons. It says, "As per safety procedures and to make sure nothing was leaving the house."

MS. SKIPPER: Yes. That was Inspector Welsh's testimony.

THE COURT: And that's the real reason they looked in the backpacks. Not for safety reasons. The kids were leaving the house. They wanted to make sure they weren't taking the very evidence that they were looking for out of the house. And they did the reasonable thing, which is to not detain [30] these kids, to let them go to school. But the reasonable thing isn't always the lawful thing. Because the lawful thing is that you can't do a search until after you go over the warrant with the resident; right?

MS. SKIPPER: Well, until you present the warrant. The presentation of the warrant is supposed to be at the commencement of the search.

THE COURT: So how do you get around the fact that they searched people's bags before they presented the warrant?

MS. SKIPPER: There's nothing in the record to describe exactly how the search of the children's bags took place and whether or not that was done with the consent of the wife so that the children could leave.

THE COURT: Well, if you're going to show consent, you've got to have evidence.

MS. SKIPPER: Exactly. The alternative would have obviously been to detain the children there so that they could not leave and go to school. And it's reasonable to surmise that under those circumstances, any parent, particularly a parent who is about to have their house searched, would want the children away from the residence and would submit this to us.

THE COURT: Yeah, but that might not be a voluntary consent then. It's reasonable to say that they consent because they wanted their kids out of there. But we don't [31] have any evidence that there's even an involuntary. We don't have any evidence that there's any consent.

MS. SKIPPER: There is no evidence with regard to that issue in this record.

THE COURT: So how do you get around it?

MS. SKIPPER: I've made the arguments I think I can make, your Honor. The only other thing I think I can say is that at least with regard to Inspector Welsh's understanding of what was occurring there, he called these preliminaries to the search. And I would just submit that the Court can

consider—in the government's view, these are preliminaries to the search as opposed to the actual beginning of the search.

THE COURT: You take the same kind of reasoning as in Weber, though, here, Mr. Reichel. And that is that, okay, if they found anything in the bags, it would be suppressed.

MR. REICHEL: I'm sorry, your Honor. I don't understand the Court's question.

THE COURT: I hadn't finished yet.

MR. REICHEL: I'm sorry.

THE COURT: In Weber, the court only ordered the suppression of the evidence that was—

MR. REICHEL: Well, there was no probable cause for that evidence.

THE COURT: No probable cause. So you can sever—

[32]

MR. REICHEL: A warrant.

THE COURT: —certain things. And I don't know what the law is. I guarantee you it depends on which panel you get on the court. But I bet you find cases that say when they come in and they start to search, and something isn't done, whatever they acquire before the right thing is done is suppressed. But after they do that, then anything they acquire afterwards, unless it's fruit of the

poisonous tree, is admissible. I bet you I find cases that say that.

MS. SKIPPER: No, your Hono[illegible]. That actually isn't the law.

THE COURT: Okay. Then you lose that argument.

MS. SKIPPER: The Ninth Circuit actually has held that if there is a Rule 41(d) violation, it does not require suppression unless there is a deliberate disregard of the rule on the agent's part or the defendant was prejudiced by the violation. And I would submit that—

THE COURT: Or the defendant was prejudiced.

MS. SKIPPER: Or the defendant was prejudiced.

THE COURT: Okay. Then that's the ruling then. See, if the defendant—that's another way of saying what I was trying to get to. If the defendant isn't prejudiced by—how is the defendant prejudiced by the fact that the backpacks were searched?

MR. REICHEL: I don't think that he's claiming a [33] prejudice from the backpacks.

THE COURT: What's the case say? Give me that again. Rule 41 violation.

MS. SKIPPER: A violation of this rule, Rule 41(d), does not require suppression unless there was

a "deliberate disregard of the rule," or the defendant was prejudiced by the violation. And that is from the Gantt case.

MR. REICHEL: Thank you, your Honor.

Okay. I believe it's the government's burden, your Honor, to prove that one of those exceptions applies. And in this case I strongly believe at the outset of the search, they walk up to Mr. Grubbs, they say Mr. Grubbs—they don't say something like you know why we're here, don't you, and now Mirandize him. To me, it seems simple. Mr. Grubbs, we have a search warrant to search your residence. This is it, sir. We'd ask you to comply or to remain compliant, and you can review the warrant, sir. We're going to commence the warrant now. And then to enter the residence in light of the fact they absolutely know that there is a mother, two children, and Mr. Grubbs who reside there. The triggering event has just occurred, they've delivered it, he's walked out of the residence, and she's walked out of the residence with the two children, your Honor.

And instead they don't give him at the outset and say, Mr. Grubbs, this is the warrant to search your premises, and [34] it's got all of the attachments, it's a complete warrant. Instead, they have flagrant disregard for the rule.

THE COURT: Why would they deliberately disregard the rule? What advantage do they get from it?

MR. REICHEL: Your Honor, I know this. In the Gantt opinion, interestingly enough, I believe it's from Gantt, is they ask about the warrant. I believe it's Gantt—it may be another case. And I'll look at them—where they asked about the warrant. Because they asked, officers didn't provide, I believe that there's opinions that say if you ask, the officers don't provide, that's a flagrant disregard.

In this case, I think it's absolutely the same. Mr. Grubbs is not provided it. He's not provided it for 30 minutes. In that 30 minutes, Ms. Grubbs is saying what's going on, they're searching. I strongly believe the evidence is clear they're seizing and searching the residence at that point, and they're not given the warrant until 30 minutes later.

It's a flagrant disregard. And so the Court can either find flagrant disregard or prejudice to Mr. Grubbs.

THE COURT: What's the prejudice?

MR. REICHEL: "Or," your Honor.

THE COURT: Okay. So you don't have any argument that he was prejudiced by it.

MR. REICHEL: Other than he made—well, yes, your [35] Honor. You are prejudiced. I mean he allegedly consented 30 minutes later to a search. He allegedly made statements which were not—

THE COURT: There's no issue of consent here. They're not offering anything that they need to rely on consent.

MR. REICHEL: He made statements, your Honor. He made non-Mirandized statements.

THE COURT: That's what we're going to get to later this afternoon, I guess. There's so many issues in this. That's why I said to go through them one at a time. I'm going to take this thing under submission and probably give you about a 60-page memo on it, because there's no way I can refer all the issues to rule from the bench. We haven't even got to the Miranda yet.

MR. REICHEL: Under Gantt, the government bears the burden, I believe, your Honor. And all I have to do to defeat their meeting of their burden is to satisfy one or to prevent her from satisfying one of two alternatives. And the one I say, the disregard here, is flagrant, your Honor. There's nine people there.

THE COURT: They didn't say flagrant. What was the word?

MS. SKIPPER: Deliberate disregard.

THE COURT: Deliberate disregard means not that you did something intentionally, but that you did it in order to [36] disregard the rule. In other words, not that you just did it intentionally, but that you actually knew about the rule and deliberately disregard it. Right?

MR. REICHEL: Correct.

THE COURT: Okay. So why would they deliberately disregard the rule? What possible benefit

would they think they get from not just giving them the warrant?

MR. REICHEL: I can't examine their mind, your Honor, to ask why. Perhaps they thought there was a benefit in the search to them to obtain statements from an individual, to have an advance heads up on the search. There could be a variety of reasons. I know that their actions and their conduct can also speak as to their thoughts.

And I think deliberate also has a dual definition, your Honor. Not just what advantage they intended to gain, but their conduct and if it was deliberate. I believe he testified—this may be in the transcript—that he knows he's supposed to give it at the outset.

I think what's relevant to this Court is what they are trained on, what's relevant to this Court is what do the inspector's manuals state, and I also believe that this is right on with Gantt. I believe it is Gantt. The facts here, to me, are the same as in Gantt. Gantt was asking for the warrant. I believe it wasn't shown to them at the beginning. As a result, it wasn't prejudice that was held. It was the [37] deliberate indifference to the rule.

And in this case, Ms. Grubbs and Mr. Grubbs asking what's going on, what's going on, is the same.

MS. SKIPPER: Your Honor, with regard to whether they were deliberately indifferent to the rule or deliberately disregarded the rule, I think really with regard to the backpack, I do not believe

that they can show deliberate disregard to the rule because they were trying to act reasonably with regard to getting the children to school.

THE COURT: Whether they were acting reasonably or not is not the question. It's whether they disregarded the rule. The rule may be unreasonable, but the question is did they deliberately disregard the rule.

MS. SKIPPER: I don't believe they deliberately disregarded the rule. I think at that point the inspectors believed that they were simply smoothing this over so that this could occur, but they did not consider the search of the backpacks at that point to be a deliberate disregard of the rule. They were not trying to get around the rule so that they could look at the backpacks. They simply wanted to allow the children to get to school on time.

With regard to the search of the residence, any delay to get statements from Mr. Grubbs is belied by the evidence, because the only statement that they got at that point was when Inspector Welsh walked up to Mr. Grubbs. It was a [38] previous statement. They did not continue to question him. There are no more statements until they actually sit down in the residence and Mr. Grubbs is given his Miranda rights.

THE COURT: All right. How many more issues do you think we have?

MS. SKIPPER: I think one and a half.

THE COURT: Okay. Let's go to the next issue.

MS. SKIPPER: Okay. This is a corollary of whether or not the affidavit had to be presented to Mr. Grubbs. The defendant has cited the McGrew, Van Damme, and Ramirez cases. And I would simply distinguish those on this ground. Those cases deal with the need to meet the particularity requirement of the Fourth Amendment, and that is not at issue in this case.

Attachment B to the search warrant meets the particularity requirement. And because the warrant itself met the particularity requirement, you need not have presented the affidavit to do so. Those cases are where the—

THE COURT: Maybe I better hear from Mr. Reichel on that, because I don't understand the argument.

What's the argument?

MR. REICHEL: Thank you, your Honor.

In anticipatory search warrant cases, you can't satisfy Rule 41 and you can't satisfy the Fourth Amendment if you don't leave the affidavit as well, which contains the [39] triggering event. In an anticipatory search warrant case, if the search warrant itself does not have the triggering event on the face of it or in the attachments on where to search—

THE COURT: I thought that was the same issue we were talking about.

MR. REICHEL: The affidavit must be given to the citizen.

MS. SKIPPER: Well, the way Mr. Reichel is presenting it now, it is the same issue. That's not the way it was presented in the brief. Because the McGrew, Van Damme, and Ramirez cases don't deal with triggering event. They deal specifically with the particularity of a warrant under the Fourth Amendment. And so I'm just saying that those cases really are inapposite here.

THE COURT: Well, if it doesn't bother you too much, in my written order I'm not going to address this because I don't understand it.

MR. REICHEL: I'm sorry, your Honor. Maybe I need to make it clearer. It's set forth in my last pleading which was filed ten days ago.

THE COURT: That's the one I spent about three hours reading. So if I don't understand it yet, I'm just not going to understand it.

MS. SKIPPER: Well, maybe I can help, your Honor. I think I understand the defendant's argument with regard to [40] this. What he's saying —and he can correct me if I'm wrong—looking at the McGrew, Van Damme, and Ramirez cases, in those cases, for whatever reason, either because an attachment was not made or there was no attachment listing what items were to be seized, the affidavit was the only source of information to determine what was to be seized at the execution of the search warrant.

In the McGrew case, the affidavit was the only document that contained the list. They did not have an attachment. In Van Damme, they forgot to put attachment one with the search warrant. And so there was no list of the items that were to be seized, and there was no evidence that the application or the affidavit was at the site of the search. So, again, there was nothing there that said what items could be seized.

THE COURT: I just don't understand this as being any different than the argument we spent the first part of this hearing discussing.

MR. REICHEL: The argument is, your Honor, that you cannot leave behind a search warrant, and that's it, without the affidavit if it is an anticipatory search warrant that has the triggering event only in the affidavit.

THE COURT: Weren't we discussing that earlier today?

MS. SKIPPER: Yes, we were. And that was not the way it was raised in the defense briefs, so I was addressing it in [41] a different context. But if that's the sum total of the argument, then there is nothing else to say about that.

THE COURT: That's what I understand. I thought that was the same thing we were discussing earlier.

MS. SKIPPER: Then that leaves us with whether the defendant's statements that were

made before the Miranda warnings were given should be suppressed.

THE COURT: All right. Let's hear that argument.

MS. SKIPPER: Okay. It's the government's argument that there was no custodial interrogation in this case. It is clear the defendant was seized outside of his home. The defendant claims that. The government does not refute that. He was seized. He was not free to leave. But under Ninth Circuit case law, that is not the end of the inquiry, because it is lawful to temporarily detain someone or seize someone without it turning into a custodial interrogation. And that's from the Woods case which is cited in the government's brief.

In this instance, what you have to look at is the nature of that detention, what occurred in it. And in this instance, several things are clear. This interrogation took place outside. No physical force was used. There is no evidence that any weapons—

THE COURT: What are the statements that you're going to use?

MS. SKIPPER: The only non-Mirandized statement that [42] we have is, I believe it's, "Yes, I know why you're here, or, "Yeah, it's in the garage. That's the only non-Mirandized statement we have.

THE COURT: Well, that isn't even interrogation. First of all, your argument is that it's not custody. I find right now that it's not interrogation.

MR. REICHEL: Your Honor, interrogation is defined as a statement likely to elicit an incriminating response. And nine agents are there searching the house, and they say, "You know why we're here, don't you?"

THE COURT: To do a search.

MR. REICHEL: "You know why were here, don't you?"

THE COURT: Not "don't you." There's nothing about "don't you." "You know why we're here."

MR. REICHEL: I believe—I'll look through it, but Inspector Esteban is a witness to it as well as Inspector Welsh, your Honor.

MS. SKIPPER: And their testimony on that is inconsistent.

MR. REICHEL: I even believe, your Honor, if they say "you know why we are here," it's likely to elicit an incriminating response.

THE COURT: I would think it would be likely to elicit a yes or no answer which would not be incriminating.

MR. REICHEL: Your Honor, if they just purchased drugs [43] from someone and they ran up to the person and said, "you know why we're here, we're police officers," it's likely to elicit an incriminating response.

THE COURT: Well, I would make the same finding there. If you can find me one single case,

even out of this circuit, that says that that's a Miranda interrogation when you run up to a guy that just made a drug deal and you say "you know why we're here," and somebody says on an appellate court that that was a violation of his Miranda rights, I'd like to see it.

MS. SKIPPER: Well, essentially it's the government's argument that there was no interrogation.

THE COURT: Okay. I've got enough on this. That's the only statement you're talking about on the Miranda?

MR. REICHEL: Yes, your Honor.

THE COURT: Okay. I've got enough information on that.

MS. SKIPPER: And defense counsel can correct me if I'm wrong, but I think that's it.

THE COURT: All right. Well, I'm going to have to deal with this in a written order. So unless you have anything else to present, I'll take it under submission.

MR. REICHEL: Just for the full text of what was said, your Honor, Inspector Esteban does say on page 20 that his statement was, "You know why we're here, don't you?"

THE COURT: Oh, "don't you" I didn't write that [44] down.

MS. SKIPPER: Inspector Welsh in his testimony when asked what he said—

THE COURT: Oh, that was your question. "You know why we're here, don't you?" When I was writing it down, I was writing down his answer when he said it. What page is that?

MS. SKIPPER: From Inspector Esteban's testimony?

THE COURT: Esteban. That's the first thing I wrote down, so it must have been early in the testimony.

MS. SKIPPER: I think it's page 20, your Honor.

THE COURT: Well, that does say "don't you" then. I thought he said it first before somebody asked him a leading question, so you may be right. They may have said, "You know why we're here, don't you?" And I just took a note that says, "You know why we're here?" So it could have been my error in taking the note down.

MS. SKIPPER: And I would refer the Court to Inspector Welsh's testimony in this regard that begins on page 45. And he says, "I walked up and introduced myself, and I paused and I made the statement, nodding, 'You know why we're here.'" And I asked, "Did you state that as a question?" His response, "No."

"QUESTION: Were you particularly aware of whether you stated that as a question or answer?

"ANSWER: Yes.

[45]

"QUESTION: Why?

"ANSWER: Because I didn't want to ask any questions prior to Miranda."

But even if the Court were to find this was interrogation, it certainly wasn't custodial.

MR. REICHEL: I obviously would disagree, your Honor. He wasn't free to leave in any significant manner whatsoever.

MS. SKIPPER: Whether you're free to leave, your Honor, is not the test. The question is whether that detention—and I can provide the language to the Court specifically. The question is whether it was: "A formal arrest or restraint of freedom of movement of a degree associated with formal arrest." And that's actually the Supreme Court.

The Ninth Circuit certainly has noted that "questioning during a lawful temporary detention or seizure of a person is a custodial interrogation is not the law of this circuit." And that comes from United States v. Woods which is cited in the government's last brief.

There are instances certainly where individuals have been grabbed, shoved to the ground. They were not considered to be in custody at that point.

THE COURT: All right. I'll take it under submission.

MS. SKIPPER: I believe that's all, your Honor.

THE COURT: Thank you. Anything else?

[46]

MR. REICHEL: We discussed a case of Ramirez last time I was here on the point of whether this was a defective warrant because the affidavit wasn't married to it. And I want the Court to have that authority.

MS. SKIPPER: Yes, the Ramirez case. That is a case in which the court found that the attachment listing the particular items to be seized was not incorporated into the warrant or attached to the warrant, making it therefore a general warrant, which is prohibited.

THE COURT: All right. Well, it is in your brief. I think Ramirez is in your brief.

MR. REICHEL: No. It wasn't in mine, your Honor. I found it that Monday, and we came to court on a Wednesday. I'll give you the citation.

I gave you the citation the last time we appeared.

THE COURT: You've got one, two, three, four different briefs. When you get to the Court of Appeals, they're only going to have one brief, so they're going to have an advantage over me, because every time I want to look up an argument, I've got to look through four different briefs to make sure that I'm not missing your authorities.

MR. REICHEL: I've got the Ramirez opinion, your Honor. The citation is 298 F.3d 1022.

THE COURT: And what does it stand for?

MR. REICHEL: My argument that follows McGrew and it [47] follows—specifically, it follows the McGrew opinion, that a search warrant affidavit has to be provided to the individual at the commencement of the search and left at the end of the search.

THE COURT: Okay. Then we are in a different argument. I understand now that you're making a different argument. Okay. Let me get that one down.

All right. Let me hear your argument on that then, because that's the thing I said is never done. So most, if not all of the cases that I've ever had before me would have been unlawful searches under Ramirez because they never leave the affidavit. Sometimes the affidavit's even sealed. I've even ordered that affidavits be sealed. So I guess I've made it impossible for the officer to comply with Ramirez.

MS. SKIPPER: No, your Honor.

MR. REICHEL: They deal with a sealed affidavit and discuss that in the McGrew opinion, your Honor.

THE COURT: So what's your answer to that, Ms. Skipper?

MS. SKIPPER: I just think you need to look at the facts of those cases. McGrew deals with an affidavit that contained only a description of the items to be seized. That list of things that are appropriate to seized that are—

THE COURT: If that's the argument, I understand it. Because as far as I'm concerned, it's still part of that same [48] argument we were discussing about three hours ago here during the beginning of this discussion, which is that where you've got a warrant that is contingent upon something happening, that you've got to either have that contingency in the warrant that you present to the individual or you've got to present the individual with whatever it is that contains that contingency. And that I understood we were talking about a long time ago. If that's the argument, I understand it.

But if the argument is that every time an officer executes a search warrant, that he has to provide the affidavit along with it or else it's defective, that's a different argument, and I'm going to have to address that.

MR. REICHEL: I agree, your Honor.

THE COURT: Is that your argument?

MR. REICHEL: I think the Court is correct. I'm going to ask the Court to—my issue I would like the Court to answer is not presented in this case. And I don't—well, I'm going to have to submit it, because I think that an affidavit should be served, whether or not it's an anticipatory search warrant case.

THE COURT: All right. So I'll address that.

MR. REICHEL: And the Ramirez opinion, your Honor, I think supports both arguments actually. It talks about defective warrants, your Honor. And it is from March 2002, and it's from the Ninth Circuit.

[49]

THE COURT: All right.

MR. REICHEL: And it's 298 F.3d 1022. It also interestingly cites, I believe this one cites to—I believe it cites to Illinois vs. Gates and talks about the purpose of providing a citizen the search warrant.

THE COURT: All right. Anything else?

MS. SKIPPER: No, your Honor.

THE COURT: It will be a while before I get this out. It's going to take a lot of work. So you'll just have to wait. And if the Ninth Circuit thinks I waited too long, they can reverse whatever I do.

MS. SKIPPER: Presently, we don't have any further dates set.

THE COURT: We don't. Do you want to set a date then?

MS. SKIPPER: Perhaps just a control date.

MR. REICHEL: January 8th?

THE COURT: All right. I'll set a status conference on January the 8th.

MR. REICHEL: I appreciate the Court's consideration of this motion, your Honor.

THE COURT: All right. Thank you.

MS. SKIPPER: Thank you, your Honor.

(Proceedings were concluded.)

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[50]

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

KELLY O'HALLORAN, CSR 6660

AO 245B-CAED (Rev. 9/01) Sheet 1—Judgment in a Criminal Case

United States District Court
Eastern District of California

Case Number: 2:02CR00164-01

UNITED STATES OF AMERICA

v.

JEFFERY HAYMEN GRUBBS

[Filed: May 29, 2003]

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Mark Reichel,
Asst. Federal Defender
Defendant's Attorney

THE DEFENDANT:

[✓] pleaded guilty to count(s): 1 of the Indictment.
[ ] pleaded nolo contendere to counts(s)__ which was accepted by the court.
[ ] was found guilty on count(s)__ after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	**Nature of Offense**	**Date Offense Concluded**	**Count Numbers(s)**
18 U.S.C. 2252(a)(2)	Receipt of Visual Depiction of Minor Engaged in Sexually Explicit Conduct	4/19/02	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on counts(s) ___ and is discharged as to such count(s).

[ ] Count(s)___ (is)(are) dismissed on the motion of the United States.

[ ] Indictment is to be dismissed by District Court on motion of the United States.

[✓] Appeal rights given. [ ] Appeal rights waived.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: **573-45-8976**

Defendant's Date of Birth: **8/20/63**

Defendant's USM No.: **13663-097**

Defendant's Residence Address:
8664 Elk Grove Boulevard
Elk Grove, CA 95326

Defendant's Mailing Address:
8664 Elk Grove Boulevard
Elk Grove, CA 95326

5/21/03
Date of Imposition of Judgment

/s/ WILLIAM B. SHUBB
WILLIAM B. SHUBB
Signature of Judicial Officer

WILLIAM B. SHUBB, United States District Judge
Name & Title of Judicial Officer

[5/28/2003]
Date

AO 245B-CAED (Rev. 9/01) Sheet 2—Imprisonment

[p. 2 of 7]

CASE NUMBER: 2:02CR00164-01
DEFENDANT: JEFFERY HAYMEN GRUBBS

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 33 months. The service of sentence is suspended pending appeal.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.
[ ] at___on___
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[ ] before___ on___.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Officer.
If no such institution has been designated, to the United States Marshal for this district.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to_____
at, _____with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

[p. 3 of 7]

CASE NUMBER: 2:02CR00164-01
DEFENDANT: JEFFERY HAYMEN GRUBBS

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 36 months.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13,1994:

[✓] The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

[✓] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check if applicable).

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere, and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

[p. 4 of 7]

CASE NUMBER: 2:02CR00164-01
DEFENDANT: JEFFERY HAYMEN GRUBBS

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall submit to the search of his person, property, home, and vehicle by a United States Probation Officer, or any other authorized person under the immediate and personal supervision of the probation officer, without a search warrant. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
2. The defendant shall not dispose of or otherwise dissipate any of his assets until the fine and/or restitution order by this judgment is paid in full, unless the defendant obtains approval of the court.
3. The defendant shall provide the probation officer with access to any requested financial information.
4. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer.
5. As directed by the probation officer, the defendant shall participate in a correctional treatment program (inpatient or outpatient) to obtain assistance for drug or alcohol abuse.
6. As directed by the probation officer, the defendant shall participate in a program of testing (i.e. breath, urine, sweat patch, etc.) to determine if he has reverted to the use of drugs or alcohol.

7. As directed by the probation officer, the defendant shall participate in a program of mental health treatment (inpatient or outpatient), which may include the taking of prescribed psychotropic medication.

8. The defendant shall not possess or use a computer with access to any "on-line computer service." This includes any Internet service provider, bulletin board system, or any other public or private computer network. Nothing in this order shall be construed as to prohibit the defendant from using a credit card.

9. The defendant shall not possess or use any data encryption technique or program of any kind including but not limited to software, hardware, programming codes, chips and circuit boards.

10. The defendant shall (i) consent to the probation officer and/or probation service representative conducting periodic unannounced examinations of his computer(s) equipment which may include retrieval and copying of all data from his computer(s) and any internal or external peripherals to ensure compliance with the conditions and/or removal of such equipment for the purpose of conducting a more thorough inspection; and (ii) consent at the direction of the probation officer to having installed on his computer(s), at his expense, any hardware or software systems to monitor his computer use.

11. The defendant shall refrain from accessing via computer any "material" that relates to the activity in which he was engaged in committing

the instant offense, namely access to pornography of children or others.

12. The defendant shall provide all business/personal phone records to the probation offcer upon request. Further, the defendant shall provide the probation officer written authorization to request a record of all outgoing or incoming phone calls from any service provider.

13. The defendant shall not possess or use any device that is or contains an internal modem or any other means of accessing the Internet.

14. The defendant shall consent to third party disclosure to any employer or potential employer, concerning any computer-related restrictions that are imposed upon him.

15. As directed by the probation officer, the defendant shall participate in sex offender counseling.

16. The defendant shall not possess, own, use, view or read any sexually explicit material of any kind in any form, or frequent any place where its primary purpose involves sexually explicit material. Sexually explicit conduct is defined at 18 USC 2256(2) and means actual or simulated (a) sexual intercourse, including genital-genital, oral-genital, or oral-anal, whether between the same or opposite sex; (b) bestiality; (c) masturbation; (d) sadistic or masochistic abuse; (e) lascivious exhibition of the genitals or pubic area of any person.

17. The defendant shall register, as required in the jurisdiction in which he resides, as a sex offender.

18. The defendant shall register with the state sex offender registration agency in any state where the defendant resides, is employed, caries on a vocation, or is a student, as directed by the probation officer.

19. The defendant shall cooperate in the collection of DNA as directed by the probation offcer.

[p. 6 of 7]

CASE NUMBER: 2:02CR00164-01
DEFENDANT: JEFFERY HAYMEN GRUBBS

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals	$100	$3,700	$

[ ] If applicable, restitution amount ordered pursuant to plea agreement. . . .$___

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ __.

The defendant shall pay interest on any fine of more than $2500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

[✓] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[✓] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred in a case brought under Chapters 109A, 100, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until up to 60 days. An amended Judgment in a Criminal Case will be entered after such determination.

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

[ ] The defendant shall make restitution to the following payees through the U.S. District Court, in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order of percentage payment column below.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or % of Pymnt
	TOTALS:	$___	$___

**Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

[p. 7 of 7]

CASE NUMBER: 2:02CR00164-01
DEFENDANT: JEFFERY HAYMEN GRUBBS

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [✓] immediately; or

B [ ] $ _ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than _ ; or

D [ ] in installments to commence _ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _ (e.g. equal, weekly, monthly, quarterly) installments of $ _ over a period of _ year(s) to commence _ day(s) after the date of this judgment.

Special instructions regarding the payment of criminal monetary penalties:

[ ] The defendant shall pay the cost of prosecution.

FORFEITURE

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

FILED
NOV 14 2005
OFFICE OF THE CLERK

No. 04-1414

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY GRUBBS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Fourth Amendment requires suppression of evidence when officers conduct a search under an anticipatory warrant *after* the warrant's triggering condition is satisfied, but the triggering condition is not set forth either in the warrant itself or in an affidavit that is both incorporated into the warrant and shown to the person whose property is being searched.

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In the Supreme Court of the United States

No. 04-1414

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY GRUBBS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-19a) is reported at 377 F.3d 1072. An order of the court of appeals amending its opinion and denying rehearing (Pet. App. 1a-2a) is reported at 389 F.3d 1306. The memoranda and orders of the district court denying respondent's motion to suppress (Pet. App. 29a-46a) and denying his motion for reconsideration (Pet. App. 20a-28a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 2004, and amended on December 6, 2004. A petition for rehearing was denied on December 6, 2004. On February 24, 2005, Justice O'Connor extended the time within which to file a petition for a writ of certiorari

to and including April 5, 2005, and on March 23, 2005, she further extended the time within which to file a petition for a writ of certiorari to and including May 5, 2005. The petition was filed on April 21, 2005, and was granted on September 27, 2005. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

1. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Rule 41 of the Federal Rules of Criminal Procedure is reproduced at Pet. App. 78a-83a.

STATEMENT

Following the denial of a suppression motion and a conditional guilty plea in the United States District Court for the Eastern District of California, respondent was convicted of receiving in the mail a visual depiction whose production involved the use of a minor engaged in sexually explicit conduct, in violation of 18 U.S.C. 2252(a)(2). He was sentenced to 33 months of imprisonment, to be followed by three years of supervised release, and a fine of $3700. The court of appeals reversed, holding that the search of respondent's home violated the Fourth Amendment.

1. An anticipatory search warrant is "a warrant based upon an affidavit showing probable cause that at

some future time (but not presently) certain evidence of crime will be located at a specified place." 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.7(c), at 398 (4th ed. 2004). An anticipatory search warrant is most commonly issued in a case involving "the anticipated mail delivery to a certain address of a package known or reasonably believed to contain some form of contraband," and execution of the warrant ordinarily occurs "after the police determine * * * that the predicted delivery has actually occurred." *Id.* at 399-400. Anticipatory warrants obviate the need to choose between "allow[ing] the delivery of contraband to be completed before obtaining a search warrant, thus risking destruction or disbursement of evidence," and "seizing the contraband on its arrival without a warrant, thus risking suppression." *United States* v. *Ricciardelli*, 998 F.2d 8, 10 (1st Cir. 1993). Such warrants "protect[] privacy rights by requiring advance judicial approval of a planned search while simultaneously satisfying legitimate law enforcement needs." *Ibid.* Because the Fourth Amendment requires probable cause to believe that evidence of a crime "can likely be found at the described locus *at the time of the search*," *ibid.*, the federal courts of appeals have uniformly concluded that anticipatory search warrants are constitutionally permissible, see, *e.g.*, *United States* v. *Santa*, 236 F.3d 662, 671-672 (11th Cir. 2000) (citing cases).

2. a. On December 20, 2001, respondent contacted a website that offered for sale videotapes depicting minors engaged in sex acts. Pet. App. 29a-30a, 59a-60a. The website was operated by an undercover United States Postal Inspector. *Ibid.* A week later, respondent placed an e-mail order for a videotape titled "Lolita

Mother and Daughter," which depicted (according to the website) "a lovely young girl"—"if she's over 10 I'd be shocked"—engaged in sex acts with "Mom." *Id.* at 4a, 30a, 63a-64a. On February 5, 2002, the postal inspector received an envelope in his undercover post office box. *Id.* at 30a, 67a. The envelope contained $45 in cash and a handwritten letter reading: "I hope this makes it to you please send film asap thanks Jeff Grubbs 1199 Park Tarrace [*sic*] Dr., Galt, CA 95632." *Id.* at 4a, 30a, 67a.

b. On April 17, 2002, Postal Inspector Gary Welsh applied to a magistrate judge in the Eastern District of California for an anticipatory warrant to search respondent's home after the delivery of the videotape. Pet. App. 4a, 30a, 52a-77a. The triggering condition for the search was described in two different places in the supporting affidavit. Paragraph 14 of the affidavit stated that the warrant would be executed if respondent "or any other individual at the residence accepts the mail package containing the videotape and takes it into 1199 Park Terrace Drive, Galt, CA 95632." *Id.* at 57a. Paragraph 61 stated that the warrant would not be executed "unless and until the parcel has been received by a person(s) and has been physically taken into the residence located at 1199 Park Terrace Drive, Galt, CA 95632." *Id.* at 72a. Paragraph 61 went on to say that the warrant would be executed "[a]t that time, and not before." *Ibid.* "Attachment A" to the affidavit was a detailed description of the property to be searched, and "Attachment B" was a detailed list of the items to be seized. *Id.* at 74a-77a.

On the basis of the affidavit, the magistrate judge issued the warrant. Pet. App. 4a, 30a, 47a-51a. The warrant had the same two attachments as the affidavit (describing the property to be searched and the items to

be seized), and directed that it be executed within 10 days (*i.e.*, on or before April 27, 2002). *Id.* at 7a-8a, 47a-51a. At the top of the warrant, the word "ANTICIPATORY" was handwritten above the pre-printed words "SEARCH WARRANT," but the warrant itself did not describe the triggering event. *Id.* at 5a, 30a-31a, 47a.

c. On April 19, 2002, at approximately 7:20 a.m., an undercover postal inspector delivered the videotape to respondent's house. Respondent's wife accepted delivery, signed for the package, and took it inside. A few minutes later, postal inspectors saw respondent leaving and told him to stay where he was. The warrant was then executed. Shortly after the search began, Inspector Welsh said to respondent, "You know why we're here." Respondent said that he did and told Inspector Welsh that the package was in the garage. Pet. App. 6a-7a, 31a.

At approximately 7:50 a.m., respondent went back into the house with Inspector Welsh, who gave respondent a copy of the warrant. Although the postal inspectors had a copy of the supporting affidavit with them, it was not presented to respondent and it was not left at his house. Pet. App. 7a-8a, 31a-32a.

After they went inside, Inspector Welsh advised respondent of his rights, and respondent agreed to be interviewed. Respondent also consented to a search of his computer, CD-ROMs, and diskettes. During the interview, respondent admitted that he had ordered the videotape and that he had other child pornography. Respondent was then placed under arrest. The postal inspectors seized the videotape and a number of other items. Pet. App. 8a, 32a.

3. A grand jury in the Eastern District of California returned a one-count indictment charging respondent

with receipt of child pornography, in violation of 18 U.S.C. 2252(a)(2). Pet. App. 8a-9a, 32a; J.A. 17-18. Respondent filed a motion to suppress the physical evidence seized from his house and the statements he made to Inspector Welsh. Pet. App. 9a, 29a. One of the claims in respondent's motion was that "the agents' failure to present the affidavit to [him] or his wife rendered the warrant inoperative," because the warrant did not describe the triggering event. *Id.* at 9a.

After an evidentiary hearing, J.A. 19-115, the district court denied the motion to suppress, Pet. App. 29a-46a. In rejecting the claim that suppression was required because respondent had not been given a copy of the affidavit (*id.* at 36a-39a), the court applied the Ninth Circuit's decision in *United States* v. *Hotal*, 143 F.3d 1223 (1998). As the district court observed (Pet. App. 37a), that case held that "an anticipatory search warrant must either on its face or on the face of the accompanying affidavit[] clearly, expressly, and narrowly specify the triggering event," and that the document specifying the triggering event must be in the "immediate possession" of those conducting the search. 143 F.3d at 1227. The district court concluded that the requirements of *Hotal* were satisfied, because "the triggering event [wa]s specified in the affidavit," "[t]he warrant incorporated the affidavit," and "[t]he warrant and affidavit were * * * in the immediate possession of the officers while they searched [respondent's] residence." Pet. App. 37a. The court rejected respondent's contention that *Hotal* "requires the affidavit to be presented with

the warrant to the people whose property is being searched." *Id.* at 38a.[1]

Respondent filed a motion for reconsideration, which the district court denied. Pet. App. 20a-28a. Respondent then entered a conditional guilty plea, see Fed. R. Crim. P. 11(a)(2), to the sole charge in the indictment, reserving his right to appeal the denial of his suppression motion. Pet. App. 10a. The district court sentenced him to a prison term of 33 months. *Ibid.*; J.A. 177-192.

4. The court of appeals reversed the denial of respondent's suppression motion and remanded the case to give respondent an opportunity to withdraw his plea. Pet. App. 1a, 3a-19a.

In an opinion by Judge Reinhardt, the court first observed that the Fourth Amendment requires that warrants "particularly describ[e] the place to be searched[] and the persons or things to be seized." Pet. App. 10a. The court went on to say that a warrant that violates this "particularity requirement," and is therefore "facially defective," can be "cured" by an affidavit that (a) is "sufficiently incorporated" into the warrant

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[1] The district court also ruled that there was probable cause for the issuance of the warrant insofar as it authorized a search for the videotape (Pet. App. 32a-35a); that the postal inspectors' failure to provide a copy of the warrant at the outset of the search did not require suppression under Rule 41 of the Federal Rules of Criminal Procedure (*id.* at 39a-44a); and that respondent's statements were not obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966) (Pet. App. 44a-46a). In his suppression motion, respondent also contended that there was no probable cause for the issuance of the warrant insofar as it authorized a search for items other than the videotape and that he had not validly consented to the search of his computer, but the court ruled that those claims were moot, because the government did not intend to offer at trial any physical evidence other than the videotape. *Id.* at 35a-36a.

and (b) "accompanies" the warrant. *Id.* at 1a, 12a. But a defect in the warrant "is not cured," the court said, if the affidavit "is not shown to the persons being subjected to the search." *Id.* at 12a.

Relying on the Ninth Circuit's decision in *Hotal*, the court then explained that "the particularity requirement of the Fourth Amendment applies with full force to the conditions precedent to an anticipatory search warrant." Pet. App. 13a. Thus, the rule in the Ninth Circuit is that, "when a warrant's execution is dependent on the occurrence of one or more conditions, the warrant itself must state the conditions precedent to its execution and these conditions must be clear, explicit, and narrow." *Ibid.* (quoting *Hotal*, 143 F.3d at 1226). The rationale for the rule, the court said, is that "a warrant conditioned on a future event presents a potential for abuse above and beyond that which exists in more traditional settings," because, "inevitably, the executing agents are called upon to determine when and where the triggering event specified in the warrant has actually occurred." *Ibid.* (quoting *Hotal*, 143 F.3d at 1226, in turn quoting *Ricciardelli*, 998 F.2d at 12). In the Ninth Circuit's view, application of the particularity requirement is "the only way effectively to safeguard against unreasonable and unbounded searches." *Ibid.* (quoting *Hotal*, 143 F.3d at 1227).

Combining these two principles—that the Fourth Amendment's particularity requirement is violated if the triggering condition is not described in an anticipatory search warrant, but that a warrant that violates the particularity requirement can be "cured" by an incorporated affidavit that "accompanies" the warrant—the court of appeals framed the question presented as "whether a curative affidavit that contains the condi-

tions precedent to an anticipatory search actually 'accompanies' the warrant when the affidavit is not shown to the person or persons being subjected to the search." Pet. App. 14a. The court answered that question no. It held that officers must "present any curative document—be it an affidavit, attachment, or other instrument that supplies the particularity and specificity demanded by the Fourth Amendment—to the persons whose property is to be subjected to the search." *Id.* at 15a. Unless the curative document is presented, the court said, "individuals w[ill] 'stand [no] real chance of policing the officers' conduct,'" because "they w[ill] have no opportunity to check whether the triggering events by which the impartial magistrate has limited the officers' discretion have actually occurred." *Ibid.* (quoting *Ramirez* v. *Butte-Silver Bow County*, 298 F.3d 1022, 1027 (9th Cir. 2002), aff'd *sub nom. Groh* v. *Ramirez*, 540 U.S. 551 (2004)).

Applying that rule, the court concluded that the warrant in this case was "inoperative," and that the search was therefore "illegal," because "there is no dispute that the officers failed to present the affidavit—the only document in which the triggering conditions were listed—to [respondent] or [his wife]." Pet. App. 16a. Nor did it matter, the court said, that "the search ultimately may have been conducted in a manner consistent with the application for the warrant." *Ibid.* The court explained that, "[i]f a warrant fails for lack of particularity or specificity, it is simply unconstitutional—without regard to what actually occurred." *Ibid.* (quoting *Hotal*, 143 F.3d at 1227). The result, in the court's view, was that the officers in this case "in effect[] conducted a warrantless search." *Id.* at 17a. The court therefore held that all evidence, including the videotape and respon-

dent's statements, must be suppressed. *Id.* at 17a & n.10.[2]

SUMMARY OF ARGUMENT

The Fourth Amendment does not require suppression of evidence seized under an anticipatory search warrant whenever the triggering condition is not set forth in the warrant or in a supporting affidavit that is both incorporated into the warrant and shown to the person whose property is being searched. As long as the triggering condition is adequately described in the affidavit that establishes probable cause and the search is conducted after the triggering condition is satisfied, there is no Fourth Amendment violation warranting suppression. Because those requirements were satisfied here, the Ninth Circuit's judgment must be reversed.

A. The text of the Fourth Amendment makes clear that its particularity requirement does not apply to the triggering condition for an anticipatory search warrant. The only items that must be "particularly describ[ed]" in a warrant are "the place to be searched" and "the persons or things to be seized." U.S. Const. Amend. IV (Warrant Clause). The triggering condition does not fit into either of those categories; it relates neither to the place to be searched nor the object of the search, but instead describes the future event that triggers the search. Insofar as any aspect of the Warrant Clause addresses the triggering condition, it is the requirement that a warrant's issuance be "upon probable cause" and "supported by Oath or affirmation." For that reason,

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[2] Respondent also raised in the court of appeals the Rule 41 and *Miranda* claims he had raised in the district court (Resp. C.A. Br. 17-18, 31-34), but the Ninth Circuit did not reach those claims (Pet. App. 4a n.1, 7a n.3, 16a n.9).

the Warrant Clause requires only that the triggering condition be described in the supporting affidavit. A warrant that omits the triggering condition does not violate the particularity requirement, and the Ninth Circuit thus erred in believing that the purported particularity "defect" in such a warrant is in need of being "cured" by including the triggering condition in an affidavit that is both incorporated into the warrant and left with the person whose property is being searched. Pet. App. 12a.

B. The policy considerations on which the Ninth Circuit relied cannot overcome the constitutional text. The Fourth Amendment requires a warrant to specify the place to be searched and the persons or things to be seized. The Ninth Circuit has expressed the view that it is "equally important" that the resident be advised of when the search may first take place and the condition whose occurrence authorizes it. *United States* v. *Hotal*, 143 F.3d 1223, 1227 (1998). That the text of the Fourth Amendment does not require warrants to describe matters of timing or conditions, however, is compelling evidence that those who framed and ratified the Bill of Rights did not share the Ninth Circuit's view, and the history of the Fourth Amendment is consistent with that conclusion.

The Ninth Circuit has also said that requiring the triggering condition to be described in the warrant is the only effective way to safeguard against unreasonable searches and that, if residents were not made aware of the triggering condition at the time of the search, they would stand little chance of policing the officers' conduct. The best safeguard against unreasonable searches, however, is a motion to suppress (in a criminal case) or a claim for damages (in a civil case), not confronting offi-

cers who are poised to execute a warrant. In any event, including the triggering condition in the warrant will rarely assist the property owner in policing the search, because there is no general requirement that the warrant be served at the outset of the search. See *Groh* v. *Ramirez*, 540 U.S. 551, 562 n.5 (2004).

The Ninth Circuit also sought to justify its rule on the ground that anticipatory warrants present a greater potential for abuse than traditional warrants, because the determination of whether the triggering event has occurred will be made by the executing officers. But anticipatory warrants may in fact "offer greater, not lesser, protection against unreasonable invasion of a citizen's privacy." *United States* v. *Gendron*, 18 F.3d 955, 965 (1st Cir.) (Breyer, C.J.), cert. denied, 513 U.S. 1051 (1994). To safeguard against premature execution, moreover, courts need not write an additional requirement into the Warrant Clause. They need only ensure that the triggering condition described in the affidavit is "explicit, clear, and narrowly drawn." *E.g.*, *United States* v. *Brack*, 188 F.3d 748, 757 (7th Cir. 1999).

C. If there is any defect in an anticipatory warrant, like the one in this case, that authorizes a search from the date of issuance until ten days thereafter, see Fed. R. Crim. P. 41(e)(2)(A), but does not describe the triggering event, the defect is that the warrant is overbroad as to time. That is because the warrant, on its face, authorizes a search before the triggering event has occurred. In a case of that type, however, the warrant is not invalid on its face. The appropriate remedy, if there is any need for one, would be to sever and invalidate the portion of the warrant that authorized a search before the triggering event. But as long as the search *in fact* occurred *after* the triggering event, as it did here, no

evidence was improperly obtained and suppression is not required.

ARGUMENT

A SEARCH UNDER AN ANTICIPATORY WARRANT IS CONSTITUTIONAL IF IT TAKES PLACE *AFTER* THE WARRANT'S TRIGGERING CONDITION IS SATISFIED, EVEN IF THE TRIGGERING CONDITION IS NOT INCORPORATED INTO THE WARRANT AND SHOWN TO THE PERSON WHOSE PROPERTY IS BEING SEARCHED

The Ninth Circuit has interpreted the Fourth Amendment to require suppression whenever the triggering condition for an anticipatory search warrant is not specified either in the warrant itself or in a supporting affidavit that is both incorporated into the warrant and left with the person whose property is being searched. The Ninth Circuit's interpretation of the Fourth Amendment is mistaken.

A. The Text Of The Fourth Amendment Makes Clear That The Particularity Requirement Does Not Apply To The Triggering Condition For An Anticipatory Search Warrant

1. As this Court has observed, the Warrant Clause of the Fourth Amendment has "four[] requirement[s]." *Groh* v. *Ramirez*, 540 U.S. 551, 557 (2004). It provides that "no Warrants shall issue, but [1] upon probable cause, [2] supported by Oath or affirmation, and particularly describing [3] the place to be searched, and [4] the persons or things to be seized." U.S. Const. Amend. IV (Warrant Clause). The fundamental flaw in the Ninth Circuit's rule is that it adds a fifth requirement. The decision below holds that "the particularity requirement of the Fourth Amendment applies with full force to the

conditions precedent to an anticipatory search warrant." Pet. App. 13a. "The language of the Fourth Amendment * * * cannot sustain [that] contention." *California* v. *Hodari D.*, 499 U.S. 621, 626 (1991).[3]

The only items that the Fourth Amendment requires to be "particularly describ[ed]" in a warrant are "the place to be searched" and "the persons or things to be seized." The triggering condition fits into neither category. Instead, the triggering condition is one aspect of the government's showing as to why there is probable cause for a search, once a contingency is satisfied. The Fourth Amendment requires that a warrant specify where the officers may search and what they may seize, but it does not require that a warrant specify the basis for the agents' authority to search—*e.g.*, the basis for believing that there is, or will be, evidence of a crime on the premises. Insofar as any aspect of the Warrant Clause addresses the triggering condition, it is the requirement that the warrant be based on probable cause and supported by sworn testimony. Accordingly, while the Fourth Amendment requires that the triggering condition be described in the supporting affidavit, which is made under "Oath" and submitted to the magistrate to establish "probable cause," it does not require that the triggering condition be described in the warrant, which must "particularly describ[e]" only the "place to be searched" and the "things to be seized." Since the affidavit in this case described the probable cause for

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[3] Indeed, even a defender of the Ninth Circuit's rule forthrightly acknowledges that it "essentially writes a new particularity requirement into the Fourth Amendment." Brett R. Hamm, Note, United States v. Hotal: *Determining the Role of Conditions Precedent in the Constitutionality of Anticipatory Warrants*, 1999 BYU L. Rev. 1005, 1017.

the search, including the triggering condition (Pet. App. 57a, 72a), and the warrant (and its attachments) described with particularity the place to be searched and the items to be seized (*id.* at 47a-51a), the requirements of the Warrant Clause were satisfied.

In *Oliver* v. *United States*, 466 U.S. 170 (1984), this Court relied on "the explicit language of the Fourth Amendment," *id.* at 176, in reaffirming the "open fields" doctrine, which permits law enforcement officers to enter and search a field without a warrant. The Court explained that the first clause of the Fourth Amendment "indicates with some precision the places and things encompassed by its protection[]"—namely, "persons, houses, papers, and effects"—and that the protection against "unreasonable searches and seizures" therefore "is not extended to the open fields." *Ibid.* (quoting *Hester* v. *United States*, 265 U.S. 57, 59 (1924)). The same interpretive principle applies to the second clause of the Fourth Amendment. That clause indicates with precision what a warrant must describe with particularity—namely, "the place to be searched[] and the persons or things to be seized"—and the particularity requirement therefore does not extend to the triggering condition for an anticipatory warrant. With the exception of the Ninth Circuit, every court of appeals to consider the question has so held.[4]

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[4] See *United States* v. *Dennis*, 115 F.3d 524, 529 (7th Cir. 1997) ("the anticipatory warrant was valid even though it did not list the conditions precedent to execution on its face"); *United States* v. *Hugoboom*, 112 F.3d 1081, 1087 (10th Cir. 1997) (rejecting claim that warrant's failure to specify triggering condition "is constitutional error"); *United States* v. *Moetamedi*, 46 F.3d 225, 229 (2d Cir. 1995) ("an anticipatory warrant is valid even though it does not state on its face the conditions precedent for its execution"); *United States* v. *Tagbering*, 985 F.2d 946,

2. Because the Ninth Circuit erred in holding that, under the particularity requirement of the Fourth Amendment, the triggering condition for an anticipatory search warrant must be described on the face of the warrant, it necessarily erred in holding that, if the triggering condition is *not* set forth in the warrant, it must be set forth in a supporting affidavit that is both incorporated into the warrant and left with the person whose property is being searched. The court's "incorporated-and-provided affidavit" requirement is simply an application of the principle that "a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." *Groh*, 540 U.S. at 557-558. Since, contrary to the Ninth Circuit's holding, a warrant that omits the triggering condition does not violate the particularity requirement, there is no "defect" in such a warrant in need of being "cured" by the affidavit. Pet. App. 12a.

B. There Is No Basis For Rewriting The Text Of The Fourth Amendment

1. The policy considerations on which the Ninth Circuit relied cannot overcome the constitutional text

a. The rule adopted by the Ninth Circuit is based, not on the text of the Fourth Amendment (or even its history), but on the policy views of that court. In *United States* v. *Hotal*, 143 F.3d 1223 (1998), the Ninth Circuit said that, insofar as it applies to the items to be seized, the Fourth Amendment's particularity requirement

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950 (8th Cir. 1993) (Constitution does not require that triggering condition "be written into the warrant itself"); *United States* v. *Rey*, 923 F.2d 1217, 1221 (6th Cir. 1991) (fact that warrant did not specify triggering condition "does not render it void").

"serve[s] the purposes of, first, ensuring that the 'discretion of the officers executing the warrant is limited,' and second, informing the person subject to the search of what items are authorized to be seized." *Id.* at 1227 (quoting *United States* v. *Towne*, 997 F.2d 537, 548 (9th Cir. 1993)). That statement may be a correct description of the Particularity Clause's purposes.[5] But the Ninth Circuit erred in reasoning that those purposes justify extending the Particularity Clause to requirements not set forth in its text. The court stated that "[i]t is equally important to ensure that all parties be advised when the search may first take place, and the conditions upon the occurrence of which the search is authorized and may lawfully be instituted." *Ibid.* That the text of the Fourth Amendment does not require warrants to describe either of those things, however, is compelling evidence that those who framed and ratified the Bill of Rights did not believe that advising a person of those facts was "equally [as] important" (*ibid.*) as specifying what property may be searched and what things may be seized.

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[5] This Court has stated that "[t]he manifest purpose of th[e] particularity requirement was to prevent general searches." *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987). By "limiting the authorization to search to the specific areas and things for which there is probable cause to search," the requirement "ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Ibid.* The Court has also stated that "the purpose of the particularity requirement is not *limited* to the prevention of general searches," and that the requirement also "assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Groh*, 540 U.S. at 561 (quoting *United States* v. *Chadwick*, 433 U.S. 1, 9 (1977)) (emphasis added).

The history of the Fourth Amendment confirms that the Particularity Clause addressed specific problems and was not intended to require that warrants contain information beyond that required by the explicit text. The central historical experience that prompted the Fourth Amendment's adoption is widely viewed as the Framers' aversion to general warrants—warrants that lacked specificity concerning the place to be searched or the person to be arrested and that often lacked an adequate showing of cause.[6] The American response to those concerns, first in the bills of rights contained in the state constitutions and then in the Fourth Amend-

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[6] See, *e.g.*, *Stanford* v. *Texas*, 379 U.S. 476, 481 (1965); *Marcus* v. *Search Warrant*, 367 U.S. 717, 728-729 (1961); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 558 & n.12 (1999); cf. David A. Sklansky, *The Fourth Amendment and Common Law*, 100 Colum. L. Rev. 1739, 1799-1800 (2000) (describing several varieties of warrants that were found objectionable in cases that attracted widespread notice in the colonies). The specific form of general warrant that incited the colonists' ire was the "writ of assistance," a form of general warrant distinguished in part by its long duration: "they were good for the lifetime of the reigning sovereign plus six months." Gerard V. Bradley, *The Constitutional Theory of the Fourth Amendment*, 38 DePaul L. Rev. 817. 836 (1989). See also Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 53-54 (1937) ("The more dangerous element of the writ of assistance * * * was that it was not returnable at all after execution, but was good as a continuous license and authority during the whole lifetime of the reigning sovereign."). A key vice in a warrant of such indefinite duration is addressed by the constitutional requirement that probable cause to support a warrant must be found by the magistrate and that a search may be invalid if probable cause to support the warrant has ceased to exist at the time of the search. See 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.7(a), at 648-649 (4th ed. 2004) (noting that a search may be invalid if the probable cause for the warrant has become "stale"). See also *Sgro* v. *United States*, 287 U.S. 206 (1932).

ment itself, was to require probable cause for the issuance of the warrant; an oath or affirmation to support the warrant; and specificity in the warrant as to places that were to be searched and the things to be seized or persons to be arrested.[7] There is no reason to believe that the Framers intended the precisely drafted Particularity Clause to address other matters, such as triggering conditions relevant to probable cause. Indeed, the kind of investigations that now lead to the issuance of anticipatory warrants are highly unlikely to have existed at the time of the Framing.[8]

Respondent has suggested that, because anticipatory warrants "were unknown to those who framed and ratified the Bill of Rights," it is "unsurprising that the Fourth Amendment *[sic]* text does not address the issue." Br. in Opp. 8 n.5. But the text of the Fourth Amendment *does* address the issue. The triggering condition for an anticipatory warrant is an element of probable cause, and the Fourth Amendment provides that no warrant may issue except "upon probable cause, supported by Oath or affirmation." That is why the triggering condition must be set forth in the affidavit presented to the magistrate.

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[7] See Bradley, *supra*, 38 DePaul L. Rev. at 836-838 (discussing state constitutions); Davies, *supra*, 98 Mich. L. Rev. at 560-570, 655-660, 693-724 (discussing background of the Fourth Amendment).

[8] As one commentator has noted, "[p]roactive criminal law enforcement had not yet developed by the framing of the Fourth Amendment; in fact, even post-crime investigation by officers was minimal. * * * There were no police departments in the colonies or early states. In fact, there were no professional law enforcement officers." Davies, *supra*, 98 Mich. L. Rev. at 620. Accord *United States* v. *Wade*, 388 U.S. 218, 224 (1967) ("When the [federal] Bill of Rights was adopted, there were no organized police forces as we know them today.").

b. The Ninth Circuit also said in *Hotal*, and in this case repeated, that applying the particularity requirement to the triggering condition for an anticipatory warrant is "the only way effectively to safeguard against unreasonable and unbounded searches." 143 F.3d at 1227; Pet. App. 13a. The decision in this case amplified that reasoning by suggesting that, if residents were not made aware of the triggering condition at the time of the search, they "would 'stand [no] real chance of policing the officers' conduct.'" *Id.* at 15a (quoting *Ramirez* v. *Butte-Silver Bow County*, 298 F.3d 1022, 1027 (9th Cir. 2002), aff'd *sub nom. Groh* v. *Ramirez*, 540 U.S. 551 (2004)). This second policy argument likewise provides no basis for amending the text of the Warrant Clause, and in any event is based on a mistaken premise.

Informing a person whose property is being searched of the triggering condition is not the only (or even the most) effective way to prevent unreasonable searches. If a search took place before the occurrence of a triggering event described in an affidavit, probable cause to believe that the sought item could then be found at the searched location would be lacking and the search would likely be unreasonable (and therefore illegal). See, *e.g.*, *United States* v. *Tagbering*, 985 F.2d 946, 950 (8th Cir. 1993) ("If the warrant is executed before the controlled delivery occurs, then suppression may well be warranted for that reason."). The appropriate way to resolve a dispute about probable cause, however, is through litigation, not by confronting law enforcement agents who are poised to execute a warrant. Indeed, in no other context has it been suggested that the targets of a search are entitled to dispute on the scene whether probable cause actually exists. Rather, the legal remedy for a party who believes himself aggrieved by a search is a motion

to suppress (in a criminal case), see *Weeks* v. *United States*, 232 U.S. 383 (1914), or a claim for damages (in a civil case), see *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). It is not, as the Ninth Circuit has put it, "challeng[ing] officers," at the time of the search, who are believed to have "exceeded the limits" of their authority. *Ramirez*, 298 F.3d at 1027.[9]

The Ninth Circuit's view that search targets are entitled to contest police authority rests on its belief that the property owner must be given a copy of the warrant "at the outset of the search." Pet. App. 16a n.9 (quoting *United States* v. *Gantt*, 194 F.3d 987, 994 (1999)). But "neither the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure requires the executing officer to serve the warrant on the owner before commencing the search." *Groh*, 540 U.S. at 562 n.5.[10] As

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[9] The imperative that officers "routinely exercise unquestioned command" over the place of a warrant-authorized search, *Michigan* v. *Summers*, 452 U.S. 692, 703 (1981), which may include detention in handcuffs of the occupants of the premises, see *Muehler* v. *Mena*, 125 S. Ct. 1465, 1468 (2005), underscores that the execution of a search warrant is not an appropriate occasion for the occupants to engage in debate over the scope of the officers' authority. Indeed, federal law makes it a crime whenever one "forcibly assaults, resists, opposes, prevents, impedes, intimidates, or interferes with any person authorized to serve or execute search warrants or to make searches and seizures while engaged in the performance of his duties with regard thereto." 18 U.S.C. 2231(a).

[10] Rule 41 merely requires that the officer executing the warrant "give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken" or else "leave a copy of the warrant and receipt at the place where the officer took the property." Fed. R. Crim. P. 41(f)(3). In *Groh*, the Court reserved the question whether "it would be unreasonable to refuse a request to furnish the warrant at the outset of the search when

Judge Posner has explained, "[t]he absence of a constitutional requirement that the warrant be exhibited at the outset of the search" shows that even "the requirement of particular description" that actually appears in the Fourth Amendment "does not protect an interest in monitoring searches." *United States* v. *Stefonek*, 179 F.3d 1030, 1034 (7th Cir. 1999), cert. denied, 528 U.S. 1162 (2000). A warrant "cannot enable the occupant to monitor the search if he doesn't see it until the search has been completed." *Ibid.*

c. The Ninth Circuit's rule may ultimately be based on its belief that an anticipatory warrant "presents a potential for abuse above and beyond that which exists in more traditional settings," because, "inevitably, the executing agents are called upon to determine when and where the triggering event * * * has actually occurred." Pet. App. 13a (quoting *Hotal*, 143 F.3d at 1226, in turn quoting *United States* v. *Ricciardelli*, 998 F.2d 8, 12 (1st Cir. 1993)). As then Chief Judge Breyer observed in *United States* v. *Gendron*, 18 F.3d 955 (1st Cir.), cert. denied, 513 U.S. 1051 (1994), however, anticipatory warrants may in fact "offer greater, not lesser, protection against unreasonable invasion of a citizen's privacy." *Id.* at 965. There are at least two respects in which that is true.

First, the likely alternative to the use of an anticipatory warrant is that law enforcement officers would "simply conduct the search (justified by 'exigent circumstances') without any warrant at all." *Ibid.* Outside of the context of consent searches, see, *e.g.*, *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), this Court has "ex-

* * * an occupant of the premises is present and poses no threat to the officers' safe and effective performance of their mission." 540 U.S. at 562 n.5. That issue is not presented in this case.

pressed a strong preference for warrants," because they provide "the detached scrutiny of a neutral magistrate," which is the most "reliable safeguard against improper searches," *United States* v. *Leon*, 468 U.S. 897, 913-914 (1984) (quoting *United States* v. *Chadwick*, 433 U.S. 1, 9 (1977)).

Second, "the facts put forward to justify issuance of an anticipatory warrant are more likely to establish that probable cause will exist at the time of the search than the typical warrant based solely upon the known prior location of the items to be [seized] at the place to be searched." *Gendron*, 18 F.3d at 965 (quoting 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.7(c), at 97 (2d ed. 1987)). That is because "past and presumably current possession" may only be probative of a "likelihood of future possession," whereas the delivery of contraband as anticipated in the warrant application generally establishes a "certainty of future possession." 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.7(c), at 402 (4th ed. 2004) (quoting *People* v. *Glen*, 282 N.E.2d 614, 617 (N.Y.), cert. denied, 409 U.S. 849 (1972)).

The Ninth Circuit's concern that agents executing an anticipatory warrant will have to "determine when and where the triggering event * * * has actually occurred," Pet. App. 13a, does not justify judicial amendment of the Warrant Clause. As numerous courts have recognized, the safeguard against "premature execution as a result of manipulation or misunderstanding by the police" is to ensure that "the conditions governing the execution of the warrant be explicit, clear, and narrowly drawn." *United States* v. *Brack*, 188 F.3d 748, 757 (7th Cir. 1999). Accord, *e.g.*, *United States* v. *Miggins*, 302

F.3d 384, 395 (6th Cir.), cert. denied, 537 U.S. 1097 (2002), 537 U.S. 1130, and 538 U.S. 971 (2003); *United States* v. *Rowland*, 145 F.3d 1194, 1202 (10th Cir. 1998); *United States* v. *Moetamedi*, 46 F.3d 225, 229 (2d Cir. 1995). Like the more general principle that an anticipatory search warrant may not be executed until the triggering condition occurs, the requirement that the condition be "explicit, clear, and narrowly drawn" does not stem from the particularity requirement. Instead, it assists in "maintain[ing] judicial control over the probable cause determination," *Rowland*, 145 F.3d at 1202, by assuring with clarity that the agents will not conduct the search until the triggering condition actually occurs. Because the triggering condition supports the magistrate's conclusion that there is probable cause to believe that a particular object will in fact be present on the premises to be searched, only the supporting affidavit, and not the warrant itself, must describe the triggering condition in "explicit, clear, and narrowly drawn" terms. See, *e.g.*, *id.* at 1201-1202 & n.2; *Moetamedi*, 46 F.3d at 228-229.[11]

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[11] In *Groh*, a case in which a traditional search warrant failed to specify the items to be seized, the Court rejected the contention that the search was not unconstitutional "because the scope of the search did not exceed the limits set forth in the application." 540 U.S. at 560. The Court explained that, "unless the particular items described in the affidavit are also set forth in the warrant itself * * *, there can be no written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit." *Ibid.* "The mere fact that the Magistrate issued a warrant," the Court said, "does not necessarily establish that he agreed that the scope of the search should be as broad as the affiant's request." *Id.* at 561. No similar problem is presented here. Since an anticipatory search warrant has a single triggering condition, the issuance of the warrant necessarily reflects a finding by the magistrate that there is probable

2. The First Circuit decisions on which the Ninth Circuit relied do not support its rule

In adopting, in *Hotal*, the rule at issue here, the Ninth Circuit (143 F.3d at 1226-1227) acknowledged that five circuits had rejected the rule, and purported to follow the First Circuit's decisions in *Ricciardelli*, *supra*, and *Gendron*, *supra*. While it is possible to read those decisions as requiring that the triggering event be described in an anticipatory search warrant, the First Circuit cases involved a different issue.

In *Ricciardelli*, the triggering event *was* described in the anticipatory warrant, which authorized a search of the defendant's home after a package containing child pornography was received by the defendant (not after it was received at his home). 998 F.2d at 9. The warrant was executed after the defendant picked up the package at a post office and brought it home. *Id.* at 10. The court suppressed the evidence because there was not a sufficient connection between the triggering event and the place to be searched. *Id.* at 12-14. In particular, the court held that "the event that triggers the search must be the delivery of the contraband *to the premises to be searched*." *Id.* at 13. The court relied on the principle that contraband must be "on a sure and irreversible course to its destination"—a principle, the court said, that ensures that the contraband "will almost certainly be located there at the time of the search, thus fulfilling the requirement of future probable cause." *Id.* at 12-13. Accord, *e.g.*, *United States* v. *Leidner*, 99 F.3d 1423, 1427 (7th Cir. 1996) ("Several circuits agree that in or-

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cause for a search and that the item to be seized will be present at the place to be searched when the triggering event described in the affidavit occurs.

der for an anticipatory warrant to satisfy the probable cause standard it must demonstrate that contraband is on a 'sure course' to the destination to be searched."), cert. denied, 520 U.S. 1169 (1997). The First Circuit also said that "it is the triggering condition of [the defendant's] receipt of the videotape at home" that eliminates the possibility that he was "a runner for some other person, or simply an internuncio," thereby "producing probable cause to believe that [he] is a collector of child pornography and, hence, that his residence likely contains evidence of his criminality." 998 F.2d at 14.

Ricciardelli therefore rested, not on the Fourth Amendment's particularity requirement, but on its requirement of probable cause. It is not clear from the opinion whether a more specific triggering condition, tied to the defendant's receipt of the contraband at his home, was set forth in the supporting affidavit, and even if it was, the search, in fact, did not take place after the defendant received the package at his home. Accordingly, *Ricciardelli* is consistent with the view, held by the five courts of appeals that reject the Ninth Circuit's rule, see note 15, *infra*, that suppression is not required when a proper triggering condition is set forth in the affidavit and the search occurs after the condition is satisfied.

In *Gendron*, too, the triggering event, which was "virtually identical" to the one at issue in *Ricciardelli*, 18 F.3d at 966, was described in the warrant itself. *Id.* at 965. Unlike the defendant in *Ricciardelli*, however, the defendant in *Gendron* apparently received the contraband at home. *Id.* at 967. And in contrast to its conclusion in *Ricciardelli*, the First Circuit in *Gendron* held that suppression was not appropriate, *id.* at 964-967, because the triggering event was described with "suffi-

cient clarity," *id.* at 965. Since the warrant itself in *Gendron* described the triggering event and the court held the description adequate, that case, like *Ricciardelli*, does not stand for the proposition, adopted by the Ninth Circuit, that suppression is required when it is only the supporting affidavit that contains an adequate description of the triggering condition and the affidavit is not incorporated into the warrant and shown to the person whose property is being searched.

3. The Ninth Circuit's rule cannot be justified on the ground that it imposes only a minimal burden on law enforcement

The Ninth Circuit's rule has been defended on the ground that the "burden on law enforcement" is "minimal."[12] While the burden of describing the triggering condition in an anticipatory warrant (or incorporating the supporting affidavit into the warrant and showing it to the person whose property is being searched) may be minimal, the consequences of an inadvertent failure to comply with the Ninth Circuit's rule are not.

"A law enforcement officer charged with leading a team to execute a search warrant * * * must fulfill a number of serious responsibilities." *Groh*, 540 U.S. at 567-568 (Kennedy, J., dissenting). In addition to preparing a warrant and affidavit that comply with the various requirements of the Fourth Amendment and any applicable statutes and rules, see, *e.g.*, Fed. R. Crim. P. 41, the officer must "obtain the warrant from a magistrate judge"; "instruct a search team" on the execution of the warrant; and oversee its execution "in a way that protects officer safety, directs a thorough and professional

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[12] Hamm, *supra*, 1999 BYU L. Rev. at 1030-1031.

search for the evidence, and avoids unnecessary destruction of property." *Groh*, 540 U.S. at 568 (Kennedy, J., dissenting). The officer must perform these "difficult and important tasks," *ibid.*, in "the midst and haste of a criminal investigation," *Illinois* v. *Gates*, 462 U.S. 213, 235 (1983) (quoting *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965)). As a consequence, even information that is indisputably required by the Fourth Amendment is sometimes omitted from a warrant through inadvertence. That was the case in *Groh*, where the warrant failed to specify the items to be seized. See 540 U.S. at 557; *id.* at 567-568 (Kennedy, J., dissenting).

The total omission from a search warrant of information required by the Fourth Amendment's particularity requirement—the place to be searched, or the things to be seized—will result in suppression. See *Groh*, 540 U.S. at 565 (warrant that "fail[s] to particularize the place to be searched or the things to be seized" is "so facially deficient" that "the executing officers cannot reasonably presume it to be valid") (quoting *Leon*, 468 U.S. at 923). When evidence is suppressed on that ground, the government will have to proceed to trial without evidence that is likely to be highly probative of the defendant's guilt, agree to a guilty plea on terms favorable to the defendant, or forgo prosecution altogether. The Ninth Circuit's rule extends those consequences to a new class of purported Particularity Clause errors—those involving the omission of the triggering condition for an anticipatory warrant. See *Hotal*, 143 F.3d at 1227 n.6 ("good faith" exception inapplicable to search based on anticipatory warrant that does not specify triggering event). The rule thus increases the risks involved in the search-warrant process, and magnifies the costs of an inadvertent error.

Indeed, if the court of appeals' decision is affirmed, the charges against respondent may have to be dismissed, since the court determined that both the videotape and respondent's statements must be suppressed. Pet. App. 17a. It is one thing to suppress evidence when, as in *Groh*, an officer fails to comply with a clear and textually "unambiguous[]" requirement of the Fourth Amendment, 540 U.S. at 557; it is quite another to do so when the rule on which the court relies has no basis in the Constitution. Obtaining and executing a search warrant is a complex enough undertaking as it is. Prosecutions should not be undermined by a law enforcement officer's failure to comply with additional rules found neither in the Constitution nor in applicable rules of criminal procedure.

C. Even If An Anticipatory Search Warrant That Does Not Describe The Triggering Condition Is Defective, It Is Not Invalid On Its Face And Suppression Is Not Appropriate If The Search In Fact Occurs After The Triggering Event

1. A federal search warrant must describe the time at which the search may take place. That requirement is not part of the particularity requirement of the Fourth Amendment, but instead is imposed by Rule 41 of the Federal Rules of Criminal Procedure. Subsection (e)(2) of Rule 41, titled "Contents of the Warrant," restates the Fourth Amendment's requirements that the warrant "identify the person or property to be searched" and "identify any person or property to be seized," and then recites the additional requirement that the warrant command the officer to "execute the warrant within a specified time no longer than 10 days,"

Fed. R. Crim. P. 41(e)(2)(A). The warrant in this case satisfied that requirement. See Pet. App. 47a.[13]

Like the Fourth Amendment's particularity requirement, Rule 41 does *not* require that the triggering condition for an anticipatory search warrant be set forth in the warrant. That is so even though Rule 41 clearly contemplates the use of anticipatory warrants. See Fed. R. Crim. P. 41 advisory committee note (1990 Amendments) (noting that rule "permits anticipatory warrants" by omitting word "is located," which "in the past required that in all instances the object of the search had to be located within the district at the time the warrant was issued").

2. If there is any defect in an anticipatory warrant that authorizes a search from the date of issuance until some future date but does not describe the triggering event, the defect is that the warrant is potentially overbroad—not with respect to the place to be searched or the items to be seized, but with respect to the time at which the search may occur. That is because the warrant, on its face, authorizes a search before the triggering event has occurred. In a case of that type, however, the warrant does not suffer from "facial invalidity," *Groh*, 540 U.S. at 557, and suppression is not an appro-

[13] Rule 41 also requires that the warrant command the officer to "execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time," Fed. R. Crim. P. 41(e)(2)(B); "designate the magistrate judge to whom it must be returned," Rule 41(e)(2); and command the officer to "return the warrant to the magistrate judge designated in the warrant," Rule 41(e)(2)(C). The warrant in this case also satisfied those requirements. See Pet. App. 47a.

priate remedy if the search in fact occurred after the triggering event.[14]

Separate and apart from the particularity requirement, "[t]he Fourth Amendment dictates that a magistrate may not issue a warrant authorizing a search and seizure which exceeds the ambit of the probable cause showing made to him." *United States* v. *Christine*, 687 F.2d 749, 753 (3d Cir. 1982). Accord, *e.g.*, *United States* v. *Leary*, 846 F.2d 592, 605 (10th Cir. 1988). As Judge Becker has explained, however, if such a warrant *is* issued, and a search is conducted under it, courts will sever the parts of the warrant "that are invalid for lack of probable cause" and suppress only the evidence "seized under the authority of those parts." *Christine*, 687 F.2d at 754. The Ninth Circuit itself has recognized that principle. See *In re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847, 857-858 (1991). Professor LaFave has described the rationale for severance as follows:

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[14] Indeed, it may be that the warrant contains no defect at all. Because the issuing magistrate cannot know precisely when (or if) delivery will take place, the warrant cannot be written to contain a specific time after which the search is authorized. Instead, it is reasonable for the issuing magistrate to rely on the discretion of officers inherent in the execution of warrants, see *Town of Castle Rock* v. *Gonzales*, 125 S. Ct. 2796, 2808 (2005), to execute the warrant within a fixed period after the triggering event takes place. Officers must also meet the Fourth Amendment's command of reasonableness in executing the warrant. Just as the discovery of new information can undermine the theory of probable cause presented to the magistrate and render a subsequent search unreasonable without rendering the warrant itself defective, a search conducted before the triggering event may be unreasonable without there being any defect in the warrant. See 2 LaFave, *supra*, § 3.7(c), at 408 (4th ed.) ("If a search warrant is purely an anticipatory warrant, then quite clearly if the critical future event never occurs the warrant may not be executed.").

> In the usual case, * * * all the evidence seized under a warrant tainted by some constitutional defect is suppressed simply because the seizure of every item is entirely attributable to the defect. When the warrant's fault is not so pervasive, however, the same objectives of deterrence and integrity may be served in the same way and to the same degree by limiting suppression to the fruits of the warrant's unconstitutional component.

2 LaFave, *supra*, § 4.6(f), at 643 (4th ed.). That explanation is consistent with the general exclusionary-rule principle that, if the constitutional error did not lead to the acquisition of the challenged evidence, the evidence cannot be viewed as a "product" of the violation and should not be suppressed. See, *e.g.*, *United States* v. *Crews*, 445 U.S. 463, 471 (1980).

In this respect, an anticipatory warrant without an express triggering condition can be analogized to a traditional warrant that authorizes the search of two apartments in a building—A and B—even though probable cause was shown only as to apartment B. If the officers in such a case searched both apartments, the remedy would be to sever the warrant insofar as it authorized a search of apartment A and to suppress the evidence obtained from apartment A. There would be no justification for suppressing the evidence obtained from apartment B. See, *e.g.*, *United States* v. *Pitts*, 173 F.3d 677, 679-681 (8th Cir. 1999) (where warrant authorized search of "713-715 East Lake Street," evidence seized from 715 East Lake Street was admissible "even if police lacked probable cause to search 713 East Lake Street," because "police clearly possessed probable cause to search" 715 East Lake Street); 2 LaFave, *su-*

pra, § 4.5(c) at 590 n.87 (4th ed.) ("If probable cause is present as to one place but not the other, the warrant will be upheld as to the place for which probable cause was shown."). If, instead, the officers in such a case searched only apartment B, no suppression of any evidence would be required, because the only apartment that was searched was the one as to which there was a showing of probable cause. The same is true in a case, like this one, where the anticipatory warrant, on its face, authorized a search at any time between the warrant's issuance and ten days thereafter; there was probable cause to search only after the triggering event occurred; and the search did not take place until after that occurrence. The court of appeals decisions that reject the Ninth Circuit's rule so hold.[15]

Accordingly, insofar as a warrant authorizes a search both (a) from the date of the warrant's issuance until the occurrence of the triggering event and (b) from the occurrence of the triggering event until ten days after the warrant's issuance, the appropriate remedy, if there is any defect in the warrant, is to sever the portion that authorized a search before the triggering event. Here,

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[15] See, *e.g.*, *Dennis*, 115 F.3d at 529 (suppression not required when affidavit "contained satisfactory conditions," the magistrate "read and considered the affidavit in issuing the warrant," and "the officers complied with the conditions precedent in executing the warrant"); *Hugoboom*, 112 F.3d at 1087 (suppression not required when triggering event is "stated in the affidavit that solicits the warrant, accepted by the issuing magistrate, and actually satisfied in the execution of the warrant") (quoting *Moetamedi*, 46 F.3d at 229); *Moetamedi*, 46 F.3d at 229 (suppression not required when "'clear, explicit, and narrowly drawn' conditions for the execution of the warrant are contained in the affidavit" and "those conditions are actually satisfied before the warrant is executed") (quoting *United States* v. *Garcia*, 882 F.2d 699, 703-704 (2d Cir.), cert. denied, 493 U.S. 943 (1989)).

the warrant was issued on April 17, 2002, and stated that "YOU ARE HEREBY COMMANDED TO SEARCH ON OR BEFORE April 27, 2002." Pet. App. 47a. The triggering event, and then the search, occurred on April 19, 2002. *Id.* at 6a-8a, 31a-32a. Since no search occurred before the triggering event, no evidence was improperly obtained and suppression is not required.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA

Petitioner,

v.

JEFFREY GRUBS

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether warrants issued in advance of present probable cause are constitutionally infirm or, if permissible in limited circumstances, whether anticipatory warrants must particularly state the triggering condition, the occurrence of which is required for the valid operation of the warrant.

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CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

On April 17, 2002, Postal Inspector Gary Welsh applied to a magistrate judge for an anticipatory warrant to search Respondent's home after the delivery of a videotape. Pet. App. 4a, 30a, 52a-77a. The statute cited in the warrant was 18 U.S.C. § 2252(a)(2), Pet. App. 52a, which prohibits *knowing* receipt or possession of child pornography, *id.* at 56a. Despite the clear statutory requirement of knowledge, the affidavit identifies the event that triggers the valid execution of the warrant ("triggering condition") as acceptance of the mail package by "Grubbs *or any other individual* at the residence," *id.* at 57a (emphasis supplied), or receipt "by person(s) presenting themselves as the authorized recipients of correspondence . . . addressed" to Grubbs' address, *id.* at 71a.

On the morning of April 19, 2002, a package was accepted by Grubbs' wife at the Grubbs' residence. Within minutes of Mr. Grubb's wife acceptance of the package, ten armed law enforcement officers approached Mr. Grubbs' house to execute an anticipatory search warrant. Pet. App. 6a, J.A. 39-40. Three officers detained Mr. Grubbs, J.A. 42, while several other officers entered the home and began the search. Pet. App. 6a. The remaining officers detained Mr. Grubbs' wife and two children outside. J.A. 77.

Grubbs' wife began to ask the officers what they were doing there. J.A. 7, J.A. 104. She continued to ask about the nature of the officers' business throughout the entirety of the search, which ended at about 1:30 that afternoon. *Id.* at 105. Despite her repeated questions, she was never told anything about the nature of the search or the reason for its occurrence, and she was never provided a copy of the warrant. Indeed, she "never saw a piece of paper." *Id.* at 104.

Over thirty minutes after Mr. Grubbs' seizure and the search of the house, the armed officers escorted Mr. Grubbs inside the house. Pet. App. 7a-8a. Inspector Welsh placed a copy of the search warrant on the table at which Mr. Grubbs was seated.[1] *Id.* The copy of the warrant was folded in thirds so that what was visible to Mr. Grubbs was the seal of the United States. J.A. 92-93. The affidavit in support of the warrant was not attached. Pet. App. 8a.

The "inartfully drafted" search warrant, Pet. App. 5a, was prepared on a form "forthwith" warrant, which inaccurately stated that the warrant was immediately valid to search for items known to be at the identified address at the time of the issuance. Despite the handwritten word "anticipatory" at the top of the document, the warrant commanded the immediate search of the premises. *Id.* at 47a. The warrant itself did not state what triggering conditions needed to occur in order to make the warrant valid. *Id.* at 5a. It is conceded that only the affidavit contains any reference to the triggering condition, and it is further conceded that the affidavit was never presented to Mr. Grubbs or to anyone else present that day. In fact, the only evidence ever presented about the whereabouts of the affidavit that day comes from an agent's

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[1] According to the declaration submitted following the evidentiary hearing, after the matter had been highlighted, the warrant placed on the table included Attachments A and B, which described the place to be searched and items to be seized. There was no live testimony as to this fact, and there was no opportunity either to cross-examine the officer or to rebut his testimony.

one-time answer during an evidentiary hearing that the search warrant affidavit was "at the site of the search." J.A. 82.

In sum, a copy of the warrant was presented to Mr. Grubbs over thirty minutes after the commencement of the search. That document, though denominated an "anticipatory" warrant, nowhere stated the conditions upon which it was valid. Grubbs' wife was never shown the warrant, despite her repeated inquiries as to the nature of and reason for the officer's presence. Not one copy of the attachments (the only portion of the document particularly describing the place to be searched and items to be seized) were left with anyone at Mr. Grubbs' residence. And the affidavit – the only document describing the triggering condition – was not presented to Mr. Grubbs (or anyone else present for the search).

Despite the shortcomings of the warrant and its presentation to Mr. Grubbs, the district court denied Mr. Grubbs' motion to suppress, concluding that all legal requirements had been met. Pet. App. 38a. After the district court denied Mr. Grubbs' motion to reconsider, *id.* at 20a-28a, he entered a conditional guilty plea, reserving his right to appeal the ruling on the suppression motion. *Id.* at 10a.

On that appeal, the Ninth Circuit reversed the denial of respondent's suppression motion. *Id.* at 3a-19a. The court held that the Fourth Amendment requires that a triggering condition be particularly stated on the face of the warrant (or cured by incorporation). *Id.* at 12a. Because the triggering condition was not on the face of the warrant and because the affidavit was never presented to Mr. Grubbs (or anyone else present on the day of the search), the warrant was invalid and the search violated the Fourth Amendment. *Id.* The court thus held that all evidence seized must be suppressed. *Id.* at 17a & n.10.

SUMMARY OF ARGUMENT

The text of the Fourth Amendment requires that warrants be issued *only upon* probable cause.[2] The Constitution does not say that warrants may be issued in anticipation of probable cause or upon the manifestation of probable cause at a future time. Consistent with this plain language, the Court has held that: "A search warrant . . . is issued upon a showing of probable cause to believe that the legitimate object of a search *is* located in a particular place . . . ." *Steagald* v. *United States*, 451 U.S. 204, 213 (1981) (emphasis supplied). In the ordinary (non-anticipatory) case, the requirement of present probable cause is easily met – at the moment of issuance, the warrant is valid because there is probable cause to believe that the items to be seized are located at the place to be searched. That is not the case with respect to anticipatory search warrants.

An anticipatory warrant "is a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place." 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.7(c), at 398 (4th ed. 2004); see also *United States* v. *Garcia*, 882 F.2d 699, 702 (2d Cir. 1989) ("An anticipatory warrant . . . is a warrant that has been issued before the necessary events have occurred which will allow a constitutional search of the premises; if those events do not transpire, the warrant is void."). By definition, an anticipatory warrant is issued in advance of the existence of probable cause, violating the express textual command of the Fourth Amendment.

A search warrant "serves a high function." *McDonald* v. *United States*, 335 U.S. 451, 455 (1948). It interposes

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[2] The Fourth Amendment "is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted." *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931).

between the police and the public a neutral magistrate, who weighs the needs of law enforcement against a citizen's right of privacy. *Id.* "At the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U.S. 505, 511 (1961).

The Government now seeks to undermine these well-accepted principles. The Government draws an arbitrary distinction between the time of issuance and the time of execution, maintaining that even though the warrant is invalid at the time of issuance, the executing officers are able to confer validity upon the warrant *nunc pro tunc* by manufacturing the anticipatory conditions. Nowhere is that distinction contemplated in the text of the Fourth Amendment or in the purpose underlying it. The Constitution refers to only one period, and that is the time of *issuance*. See U.S. Const. amend. IV. ("no Warrants shall *issue*, but upon probable cause") (emphasis supplied). The proposition that officers may be imbued with the power and authority to render improper warrants valid through their own efforts and discretion is entirely atextual and an anathema to the history and purposes of the amendment. A fundamental purpose of the Fourth Amendment was to limit the discretion of law enforcement. See *Berger* v. *New York*, 388 U.S. 41, 58 (1967). In pursuit of this goal, the Framers opted to require that "a neutral and detached authority be interposed between the police and the public." *Id.* at 54. It defies both history and logic to suggest, as Petitioner does, that somehow the discretionary acts of the involved law enforcement officers can in any way serve the purpose of checking executive power.

The Fourth Amendment was born out of a deep distrust of law enforcement power and a deep respect for individual liberty. The Government now claims that a warrant constitutionally insufficient at the time of issuance is 'cured' for one of two reasons. First, if the warrant is supported by probable

cause at the time of execution, there is no harm and no foul. But this is patently wrong. The Constitution nowhere contemplates that an invalid warrant is like a blank check that can become valid in the event that it is executed when probable cause exists. In fact, similar claims have been resoundingly rejected by this Court. See, *e.g.*, *Katz* v. *United States*, 389 U.S. 347, 356 (1967) (stating it is not enough that an agent act with restraint where the restraint is "imposed by the agents themselves, not by a judicial officer").

Alternatively, the Government claims that if the warrant is executed before the triggering condition has occurred, all is to be forgiven because any evidence thereby gained will be suppressed upon after-the-fact review. Again, this misunderstands the purpose of the Fourth Amendment. The Fourth Amendment is designed to create *ex ante* procedures to safeguard individual rights. Those rights become meaningless if the only protection afforded them involves post-hoc challenges. See *Beck* v. *Ohio*, 379 U.S. 89, 96 (1964) (noting it is not sufficient to "bypass the safeguards provided by an objective predetermination of probable cause," and instead substitute "the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment"). The Government's logic vitiates the purpose behind interposing a neutral magistrate, which is to prevent a search without probable cause in the first instance and not merely to provide an ineffectual precursor to later, corrective measures. If after-the-fact review were enough to protect the interests served by the Fourth Amendment, the language of the Amendment would be entirely different.

The Government asserts that to require that the triggering condition be stated on the face of the warrant is to judicially amend the Constitution. But this too is wrong. The Constitution assumes that a warrant is issued by a neutral magistrate upon a showing of contemporaneous probable cause. Assuming the existence of this valid warrant, the

Constitution requires that the warrant particularly describe the place to be searched and the things to be seized. However, in the case of an anticipatory warrant, the necessary prerequisite is not met: there has been no *ex ante* finding of probable cause. The Government cannot have its cake and eat it too by strictly construing one phrase of the amendment (the particularity requirement as to the place to be searched and the things to be seized) and loosely construing another ("no Warrants shall issue but upon probable cause"). In reality, the question presented by the Government is a question not answered by the text. That question asks what must be stated on the face of an anticipatory warrant (assuming such a warrant ~~can be~~ validly issued at all) in light of the peculiar circumstances presented by those warrants.

The text of the Fourth Amendment is ambiguous as to the answer to this question except, as noted, to call into question the very validity of such warrants in the first instance. Thus, the answer must be sought in the history and purpose of the Fourth Amendment. Those principles unambiguously require that the triggering condition – a precondition to the valid execution of the warrant – must particularly appear on the face of the warrant. This is the only way that the Warrant Clause can achieve its purpose of "assur[ing] the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *United States* v. *Chadwick*, 433 U.S. 1, 9 (1977), *abrogated on other grounds by California* v. *Acevedo*, 500 U.S. 565 (1991).

The Government asks this Court to sanction a power that is neither supported by the history or text of the Fourth Amendment. Yet in the face of this extraordinary request, the Government rejects the Court of Appeals' attempt to restrict the scope of this new power by enhancing the particularity requirement. Instead, the Government makes a fallacious appeal to the very component of its authority that the Framers sought to cabin – the exercise of its discretion. And because

the Fourth Amendment was enacted out of a deep distrust for the exercise of discretion in the conduct of house searches, the Government's appeal to its own good faith runs headlong into the history and purpose of the Fourth Amendment once again.

Because adopting the Government's position here would create a constitutional rule that is an anathema to the constitutional text and would contravene the purpose of the Fourth Amendment, this Court should affirm the ruling below.

ARGUMENT

I. ANTICIPATORY SEARCH WARRANTS ARE UNCONSTITUTIONAL BECAUSE THEY ARE ISSUED IN THE ABSENCE OF CONTEMPORANEOUS PROBABLE CAUSE.

A. The Text Of The Fourth Amendment Prohibits Anticipatory Search Warrants.

Anticipatory search warrants are unconstitutional.[3] *United States* v. *Ricciardelli*, 998 F.2d 8, 19 (1st Cir. 1993) (Torruella, J., concurring) ("Anticipatory search warrants are

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[3] The Court can consider this issue even if it was not directly raised in the petition for certiorari. *See* Sup. Ct. R. 15.2 (a nonjurisdictional argument not raised in a brief in opposition to a petition for a writ of certiorari "may be deemed waived"); *see also Caterpillar, Inc.* v. *Lewis*, 519 U.S. 61, 75 n.13 (1996). Where, as here, the resolution of the broad constitutional question is "predicate to an intelligent resolution of the question presented," *id.* at 75 n.13 (internal quotation marks omitted), the Court may regard the question "as 'fairly included' within the question presented." Further, Respondent is free "to defend the judgment below on any ground which the law and record permit, provided the asserted ground would not expand the relief which has been granted." *Smith* v. *Phillips*, 455 U.S. 209, 215 n.6 (1982); *see United States* v. *New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977) (considering issue not within the question posed in the petition for certiorari). The Court permits a respondent to defend a judgment on grounds not directly "pressed or passed upon . . . below"

violative of the Fourth Amendment.").[4] The text of the Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The text is clear: probable cause is a necessary prerequisite to the *issuance* of a search warrant.[5] See *Steagald* v. *United States*, 451 U.S. 204, 213 (1981); *United States* v. *Salvucci*, 599 F.2d 1094, 1096 (1st Cir. 1979), *rev'd on other grounds*, 448 U.S. 83 (1980).

By their very nature, anticipatory warrants are predicated on the occurrence of a future event.[6] See 2 Wayne R.

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when the case involves an appeal from a federal court judgment. *Kentucky* v. *Stincer*, 482 U.S. 730, 747 n.22 (1987).

[4] *See United States ex rel. Beal* v. *Skaff*, 418 F.2d 430, 433 (7th Cir. 1969) ("[A] warrant which antedates the commission of the offense which is relied upon to support its issuance might lack an essential element of judicial control: the requirement that probable cause exist to believe that execution will not precede the commission of the crime or possession of the goods to be seized.").

[5] Petitioner attacks the Ninth Circuit's rule as being a "judicial amendment of the Warrant Clause." Pet. Br. at 23, 12-16. In fact, it is the fundamental premise on which Petitioner's argument is based – that anticipatory warrants are permissible – that rewrites the Warrant Clause.

[6] Anticipatory search warrants can be distinguished from wiretaps on a number of grounds. First, unlike an anticipatory warrant, a wiretap is necessarily based on existing probable cause and occurs without regard to the occurrence of any future event. *See, e.g., Berger* v. *New York*, 388 U.S. 41, 55, 58-59 (1967) (describing probable cause as requiring a showing that an "offense has been or is being committed" and demanding a showing of "present probable cause"). Although the communication to be tapped will occur in the future, probable cause to believe that a crime has been (or is being) committed exists at the moment of issuance. That is not so with respect to anticipatory warrants. Further, because of the intrusive nature of wiretaps, they are required to be very closely supervised and protective procedures must be carefully drawn. *See, e.g., id.* at 58-60, 62-64. Generally, exigent circumstances must be shown since no notice is provided to the target. *See, e.g., Ker* v. *California*, 374 U.S. 23 (1963). Finally, offenses that may be the predicate for a wire or

LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.7(c), at 398 (4th ed. 2004) (defining an anticipatory warrant as "a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place"). By definition, then, at the moment a neutral judicial officer *issues* an anticipatory warrant, there is no probable cause to search the particularly specified place. See *United States* v. *Rowland*, 145 F.3d 1194, 1201 (10th Cir. 1998) (recognizing that "[p]robable cause for anticipatory warrants is contingent on the occurrence of certain expected or 'triggering' events"). The Government essentially concedes this point. See Pet. Br. at 14 ("[T]he triggering condition is one aspect of the [G]overnment's showing as to why there is probable cause for a search, *once a contingency is satisfied*.") (emphasis supplied). At the moment of *issuance*, an officer would not be permitted to execute the warrant because that warrant lacks probable cause. In fact, the contingency on which the execution of the warrant relies is called a "triggering" condition because it purportedly transforms the previously "invalid" warrant into a valid one; it is the event that creates contemporaneous probable cause. Accordingly, an anticipatory warrant is invalid at the moment it is issued and is unconstitutional.[7]

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oral interception order are limited to only those set forth in 18 U.S.C. § 2516(1). In the case of electronic communications, a request for interception may be based on a federal felony, pursuant to 18 U.S.C. § 2516(3).

[7] Even if this Court deems anticipatory warrants constitutionally permissible in limited circumstances, the warrant issued in this case must fail. This warrant was not only *issued* in the absence of probable cause, but is constitutionally infirm for the additional reason that it was *executed* in the absence of probable cause. The crime here at issue is 18 U.S.C. § 2252(a)(2), which prohibits *knowing* receipt or possession of child pornography. Pet. App. 52a, 56a; *see also United States* v. *Gendron*, 18 F.3d 955, 957-58 (1st Cir. 1994) (Breyer, J.) (finding that 18 U.S.C. § 2252(a)(2) requires that the Government prove the defendant knowingly received child pornography). The affidavit here allowed execution when

This conclusion also necessarily follows from this Court's interpretations of the Fourth Amendment's "probable cause" language. "A search warrant . . . is issued upon a showing of probable cause to believe that the legitimate object of a search *is* located in a particular place . . . ." *Steagald*, 451 U.S. at 213 (emphasis supplied); see also *Berger* v. *New York*, 388 U.S. 41, 55 (1967) ("Probable cause . . . exists where the facts and circumstances within the affiant's knowledge . . . are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed."); *United States* v. *Loy*, 191 F.3d 360, 365 (3d Cir. 1999) (noting that a search warrant must "be supported by probable cause at the time it is issued," but concluding that anticipatory warrants are not invalid per se); *Mapp* v. *Warden*, 531 F.2d 1167, 1171 (2d Cir. 1976) (stating that probable cause must be demonstrated as of "the date the warrant was issued"); *Durham* v. *United States*, 403 F.2d 190,

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any person at Mr. Grubbs' residence accepted the package. See Pet. App. at 57a, 71a. However, receipt by anyone other than Mr. Grubbs could not establish probable cause that the crime at issue had been committed, as there would not have been a *knowing* receipt unless Mr. Grubbs himself received the package. In the child pornography cases cited by the Government, the triggering condition specified that the *defendant* had to receive the contraband. *See, e.g.*, *Gendron*, 18 F.3d at 965 (stating that the warrant authorized a search "*after delivery by mail to and receipt by Daniel Gendron*," the defendant) (internal quotation marks omitted). In *Gendron*, then, the delivery to the defendant established probable cause that a crime had been committed, and thus the triggering condition was not overbroad. In this case, the triggering condition was overbroad because probable cause could have been absent even after the triggering condition was satisfied. And that is in fact what happened. The triggering condition, as set forth in the affidavit, occurred when Grubbs' wife picked up the package. Five minutes later, the officers executed the search warrant. Pet. App. 31a. No probable cause existed at that time, however, as there had been no *knowing* receipt. Thus, the warrant at issue here is invalid both because the triggering condition was overbroad, leaving too much to the discretion of the officers, and because it was executed in the absence of probable cause. This invalidity provides a separate and independent basis upon which to affirm the ruling below.

193 (9th Cir. 1968) (stating that the facts presented to the magistrate must "justify a conclusion by him that the property which is the object of the search is probably on the person or premises to be searched at the time the warrant is issued"). Cf. *Berger*, 388 U.S. at 59 (noting that continuation of a warrant is insufficient without "a showing of present probable cause"). To be valid, a warrant must be premised on "reasonabl[e] grounds for believing that the immediate search for which authority is sought may be fruitful." *Durham*, 403 F.2d at 193.

The purpose of the probable cause requirement is to keep the state out of constitutionally protected areas until it has reason to believe that a crime has been or is being committed. *Berger*, 388 U.S. at 55. This purpose was "wholly aborted" in this case. *Id.* Here, the conditional event was not an "act in furtherance" of an ongoing conspiracy or a predicate act as part of a RICO enterprise; instead, the triggering event was the core of the crime charged – receipt of the contraband.

Notwithstanding this, the Government now assumes – and the Courts of Appeal have agreed[8] – that anticipatory warrants are somehow constitutional. This assumption is based on the odd notion that a warrant invalid upon issuance can somehow be resurrected by the executing officer's ability to create probable cause at the time of execution.[9] But the

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[8] Courts of appeal have generally upheld the constitutionality of anticipatory warrants. However, this Court has never directly addressed this issue.

[9] The claim that a magistrate might reasonably have faith that the contraband will exist at the place to be searched at some point in the future also fails. First, this argument is undermined by the Government's concession that an anticipatory warrant could not be executed upon its issuance. At the moment of issuance, the warrant is inoperable because there is no probable cause to search at that time. Second, the claim that a magistrate may rely entirely upon her good faith with respect to the establishment of probable cause is to argue that the magistrate should abdicate her core constitutional duty. The parade of horribles that would attend such an abdication is lengthy. For example, nothing would prevent

Constitution nowhere suggests this principle. And, in fact, it makes no sense. The point of the Fourth Amendment is to limit the discretion of law enforcement; it is entirely illogical, then, to argue that a warrant can somehow be saved by an appropriate exercise of executive discretion. This Court has rejected that very claim. See *Katz* v. *United States*, 389 U.S. 347, 356 (1967) ("[T]he inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer."). The Fourth Amendment entirely prohibits the *issuance* of an invalid warrant. It does not matter that the anticipatory warrant may be supported by probable cause at the time of execution.

Other rules applicable in the Fourth Amendment context reveal the error in the Government's position. For example, when reviewing a probable cause determination on a motion to suppress, the reviewing court is not permitted to look beyond the evidence that was presented to the magistrate at the time of issuance. See *Whiteley* v. *Warden*, 401 U.S. 560, 565 n.8 (1971) ("[A]n otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate. A contrary rule would, of course, render the warrant requirements of the Fourth Amendment meaningless.") (internal citation omitted); *United States* v. *Castillo*, 866 F.2d 1071, 1076 (9th Cir. 1988) (review of a magistrate's probable-cause finding "is limited to the information contained within the four corners of the underlying affidavit"); *United States ex rel. Rogers* v. *Warden*, 381 F.2d 209, 215 (2d Cir. 1967) (when reviewing magistrate's assessment of probable cause, court must "consider only that information which was presented to the

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a magistrate from relying upon the officer's understanding of what the nature of the contraband is, or upon the officer's belief as to who was involved in the dissemination of that contraband. In the absence of present probable cause, nothing prevents ill-intentioned officials from manufacturing crimes.

magistrate"). When asking whether there existed probable cause sufficient to uphold the search, a reviewing court does not engage in a wholesale after-the-fact review. Instead, the court must ask only if the facts before the judge at the time of issuance supported a finding of probable cause. It does not matter that at the time of the search probable cause may have existed. What matters is that the findings of the issuing judge are supportable. This rule plainly forecloses the argument that an invalidly issued warrant can be saved if it is supported by probable cause at the time of execution. If this were the case, a reviewing court would not be limited to the evidence presented to the authorizing judicial officer.

Generally, then, the issuance/execution distinction that the Government attempts to draw is completely unsupported and unsupportable in this context. That distinction makes sense when the question is whether the officer has waited too long to execute the warrant. There, courts are not retroactively conferring validity upon an otherwise invalid warrant. Rather, courts are upholding validly issued warrants so long as the search was still supported by probable cause at the time of execution. See *United States* v. *Gerber*, 994 F.2d 1556, 1560 (11th Cir. 1993) ("Federal courts . . . have concluded that completing a search shortly after the expiration of a search warrant does not rise to the level of a constitutional violation and cannot be the basis for suppressing evidence seized so long as probable cause *continues* to exist . . . .") (emphasis supplied). In that circumstance, the warrant was valid upon its issuance; there was no constitutional violation. The only question is whether the search was also properly executed. That line of cases does nothing to aid Petitioner's argument that if the warrant is *executed* upon probable cause (as determined by the officer), it confers validity nunc pro tunc upon a warrant that was not issued "upon probable cause," as the Constitution unambiguously requires. Nothing in this Court's Fourth Amendment jurisprudence suggests that such liberties can be taken with the constitutional text when

the result is to infringe upon individual liberties. See *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931) (instructing that the Fourth Amendment "is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted").

Anticipatory warrants leave to the executing officer the power to determine when precisely probable cause to search exists. Any restraint will be "imposed by the agents themselves, not by a judicial officer." *Katz*, 389 U.S. at 356. "[B]ypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment violations 'only in the discretion of the police.'" *Id.* at 358-59 (quoting *Beck* v. *Ohio*, 379 U.S. 89, 96 (1964)). "As with general warrants, this leaves too much to the discretion of the officer executing the order." *Berger*, 388 U.S. at 59. Conferring discretion upon an officer to determine when probable cause exists undermines the entire point of requiring that the probable cause determination be made by a neutral magistrate.

At bottom, anticipatory warrants are issued in the absence of present probable cause. As the Government concedes, an anticipatory warrant could not be executed upon issuance because at that time, there is no probable cause to search. Because probable cause does not exist at the time of issuance – the only constitutionally significant event – anticipatory warrants are unconstitutional. They cannot be later resuscitated. Because anticipatory warrants are invalid per se, the ruling below should be affirmed.

B. Modern Police Practices Alter The Constitutional Balance.

The requirements of the Fourth Amendment "are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement." *Berger*, 388 U.S. at 63 (internal quotation marks omitted). Thus, the Fourth Amendment must be

interpreted in light of legitimate law enforcement needs. And perhaps, at one time, those legitimate needs supported a more expansive reading of the Fourth Amendment's probable cause requirement. However, in the face of modern police enforcement, no legitimate needs could possibly justify anticipatory warrants.

At one time, the choice may have been between a significant risk of lost evidence, searching with an anticipatory warrant, or searching under the exigent circumstances requirement. Now, there are numerous other options – principally, telephonic warrants[10] – that are designed to eliminate just such dilemmas in the field. Because of these modern realities, a clear rule prohibiting anticipatory warrants would not significantly burden law enforcement.

Today, there are numerous means by which the police may seek warrants quickly—without resorting to anticipatory warrants or the exigent circumstances requirement. Thus, there is no compelling need that justifies so clear a departure from the text and purpose of the Fourth Amendment. And "it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded." *Id.*

II. IF ANTICIPATORY WARRANTS ARE DEEMED VALID IN CERTAIN CIRCUMSTANCES, THEY MUST PARTICULARLY STATE THE TRIGGERING CONDITION ON THEIR FACE.

A. The Text Does Not Speak To What Must Be Particularly Stated On The Face Of Anticipatory Warrants.

The Government seeks to have this Court legitimize an entirely new category of warrants, one that does not require

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[10] *See* Fed R. Crim. P. 41 (authorizing telephonic warrants).

probable cause at the time of issuance.[11] Despite the grave constitutional questions presented by anticipatory warrants, see *supra*, the Government argues that the requirements applicable to such warrants are easily answered by the text. However, the constitutional text does not alone resolve this specific question.[12] See *Crawford* v. *Washington*, 541 U.S. 36, 42-43 (2004).

The Fourth Amendment states that when a warrant is issued upon probable cause, that warrant must "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. This textual requirement presumes the existence of probable cause at the time of issuance. Anticipatory warrants, however, are issued in the absence of a showing of present probable cause, and, as is conceded, are only valid upon the occurrence of a contingent event, the triggering condition. Thus, they present grave constitutional questions. *Ricciardelli*, 998 F.2d at 12 (stating that "a warrant conditioned on a future event presents a potential for abuse above and beyond that which exists in more traditional settings: inevitably, the executing agents are called upon to determine when and whether the triggering event specified in the warrant has actually occurred").

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[11] The Government may argue that probable cause that the contraband will be found at the particular place at some point in the future is sufficient to meet the constitutional standard. This does nothing to save the Government's particularity argument. It is beyond dispute that the occurrence of the triggering condition is a precondition to the valid execution of the warrant and thus provides a significant limitation on the power of the officer to search. It is for this reason that the triggering condition must be particularly stated, as is argued *infra*.

[12] The text assumes that a warrant is issued only upon a finding of present probable cause. The argument that the Fourth Amendment somehow speaks to what requirements apply in the case of an anticipatory warrant, which is not valid at the time of issuance simply makes no sense. Such warrants are not contemplated in the text, and any attempt to graft the textual requirements onto anticipatory warrants would be an artificial exercise.

The requirements that attend anticipatory warrants must be construed in light of their constitutional doubt. See *Berger*, 388 U.S. at 56. Where the use of particular techniques raise "grave constitutional questions under the Fourth" Amendment, the Court assumes "a heavier responsibility . . . in its supervision of fairness procedures." *Id.* (internal quotation marks omitted). Because the answer is not found on the face of the text,[13] this Court must turn to the history and purpose of the Fourth Amendment. *Crawford*, 541 U.S. at 42-43.[14]

B. The Purpose Of The Warrant Clause Can Be Realized Only If The Triggering Condition Of An Anticipatory Warrant Is Particularly Listed On Its Face.

The Fourth Amendment provides protection against government overreaching by requiring that "inferences be

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[13] The triggering condition could also be required by the Fourth Amendment's command that the place to be searched and items to be seized be particularly stated on the face of the warrant. In the case of an anticipatory warrant, simply stating the address or location of the place to be searched is not sufficient to specifically identify the particular place that will be searched. The place identified can only be searched after a certain triggering condition is satisfied. Thus, the triggering condition is a necessary additional component of the identification of the place to be searched and thus is encompassed by the requirement that the place be particularly stated.

[14] The Government seeks to have it both ways. The Government first wants this Court to allow anticipatory warrants, which are not contemplated by the text of the Constitution. After succeeding in advocating a broad, atextual interpretation of the probable cause requirement, the Government asks this Court to interpret strictly the text of the Fourth Amendment's particularity requirement. The Government, though, cannot have it both ways. If the text governs, then anticipatory warrants are forbidden per se. If the text does not, then the particularity requirement cannot be read in a manner that would undermine the purpose of the Warrant Clause. The Government's attempt to have it both ways runs counter to the rule that the Fourth Amendment must "be liberally construed . . . lest there shall be impairment of the rights for the protection of which it was adopted." *Go-Bart Importing Co.*, 282 U.S. at 357.

drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U.S. 10, 13-14 (1948). Removing the neutral magistrate from this role "would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Id.* at 14. Anticipatory search warrants vest discretion in the executing officers by allowing magistrates to issue warrants without making a complete finding of probable cause. In light of this fact, the Fourth Amendment's purpose must be closely analyzed to assure that any rule adopted in this context appropriately safeguards the interests protected by the Fourth Amendment.

The warrant requirement is intended to assure several critical things. First, the warrant requirement is intended to remove discretion from the executing officer, and vest that discretion in a neutral magistrate. *Berger*, 388 U.S. at 59. Further, the warrant requirement is intended to "assure[] the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *United States* v. *Chadwick*, 433 U.S. 1, 9 (1977) (citing *Camara* v. *Municipal Court*, 387 U.S. 523, 532 (1967)), *abrogated on other grounds by California* v. *Acevedo*, 500 U.S. 565 (1991); see also *Groh* v. *Ramirez*, 540 U.S. 551, 561 (2004). Without the requirement that the triggering condition be particularly stated on the face of the warrant, each of these critical purposes would be undermined.

In the normal course – where a warrant is issued upon a showing of contemporaneous probable cause – the purpose of the Fourth Amendment is fully served by requiring that only the place to be searched and the items to be seized are included on the face of the warrant. The probable cause determination has been made at the time of the issuance of the warrant, and the primary limits of the officer's power to

search – the items to be seized and the place to be searched – are both clearly stated on the face of the warrant.

This is not so in the case of anticipatory warrants. Merely listing the place to be searched and the items to be seized is insufficient to delineate the limits of the executing officer's power.[15] Where an anticipatory warrant is issued, the most critical limit of the power to search is the triggering condition. At the time of issuance, an anticipatory warrant could not be constitutionally executed. Prior to the occurrence of that triggering condition, the officer has no lawful authority at all. In fact, the warrant is simply inoperable. While a partial probable cause determination may have been made at the time of the anticipatory warrant's issuance, the valid execution of the warrant is contingent upon an externally verifiable, objective event. And the general standard – listing only the place to be searched and items to be seized – does not respond to this special circumstance. It does not identify the power of

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[15] The Government argues that there is no need to include the triggering condition on the face of the warrant as there is no requirement that the individual searched be shown the warrant at the outset of the search. Pet. Br. at 21-22. This argument is flawed on two grounds. First, the argument proves too much. Taken to its logical extreme, it suggests that it is unnecessary to include anything on the face of the warrant since that warrant is not necessarily provided to the searchee prior to the search. But this is not the point. This Court has enunciated the principles that animate the Warrant Clause, and requiring particularity as to the triggering condition serves those purposes in precisely the same manner as does including the place to be searched and items to be seized. Without drawing any distinction as to these categories, the Government's argument is utterly unconvincing because it would seemingly justify disregarding the particularity requirement in toto.

Even more, in *Groh*, this Court left open the question "whether it would be unreasonable to refuse a request to furnish the warrant at the outset of the search when . . . an occupant of the premises is present and poses no threat to the officers' safe and effective performance of their mission." *Groh*, 540 U.S. at 562 n.5. Given Grubbs' wife's continued inquiries and requests, it was unreasonable to refuse to provide her with a warrant at the outset of the search.

the executing officer, or the limits of her power, and it does not provide any check upon her discretion. Without specifying the triggering condition, an anticipatory warrant contravenes the purpose of the Warrant Clause.

Other significant problems arise when the triggering condition is not specified particularly on the face of the warrant. Anticipatory search warrants will often say one thing, and do another. By their terms, they often purport to empower a search at the moment of issuance. In fact, however, no search is permitted until the occurrence of the triggering condition. Including the triggering condition on the face of the warrant is therefore necessary to prevent the warrant from being misleading. The warrant at issue in this case, for example, actually states: "I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed o[n] the person or premises above-described and establish grounds for the issuance of this warrant." Pet. App. 47a. Despite this statement, at the moment the magistrate signed the warrant, there was no probable cause to believe that the sought items were concealed on the premises. This anticipatory warrant – by virtue of its language and form – appears to confer immediate authority. But it does not. Instead, the officers have buried deeply into the twenty-one page affidavit, the triggering condition, the occurrence of which (as the Government contends) is necessary to make the warrant valid. Not only does the face of the warrant fail to state this with particularity, but the warrant itself actually misrepresents the nature of the executive's power.[16]

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[16] The Government points out that at the top of the warrant, the word anticipatory was handwritten above the pre-printed words, search warrant. Pet. Br. at 5. However, this fact does nothing to save the defective warrant. It is unclear on the face of the warrant whether the judge actually understood and approved of the anticipatory aspect and the triggering event. Moreover, there is no way to know who wrote "anticipatory" on the warrant, or when it was written. In fact, the Assistant United States Attorney admitted that she wrote the word "anticipatory" on the face of

Generally, we accept police intrusion because we are confident that the existence of a warrant signifies that the probable cause determination has been made by a neutral magistrate and that other significant limits are clearly set forth in the warrant itself. See *Illinois* v. *Gates*, 462 U.S. 213, 236 (1983) ("[P]ossession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct."). We do not require that the facts supporting probable cause be included on the face of the warrant because the ultimate determination of probable cause is a legal conclusion, reached after careful consideration of numerous facts. Moreover, we trust that the mere existence of the warrant signifies that the neutral magistrate has made the probable cause determination; without the magistrate's approval, there would be no warrant. But this basic assumption does not hold with regard to an anticipatory warrant. Here, a magistrate has issued a warrant even though the existence of that warrant does not itself establish its sufficiency. More is required. And that more must be particularly stated on the face of the warrant.

The First Circuit agrees that the time at which the warrant becomes valid must be particularly stated in the warrant. *United States* v. *Gendron*, 18 F.3d 955, 965 (1st Cir. 1994) (Breyer, J.) (stating that "a warrant must clearly say when it takes effect"). That court concluded that, although it does not have to be more clearly specified than the place to be searched or items to be seized, "a warrant's restrictions in respect to time and place should be 'similar'" to those specifically mentioned in the Constitution. *Id.* at 966 (quoting *Ricciardelli*, 998 F.2d at 12). The Government's attempt to distinguish the First Circuit cases, Pet. Br. at 25-27, rings hollow. Although it may be the case that the precise issue presented here has not been decided by the First Circuit, that is beside the point. What matters is that the court

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the warrant "because it was not already on there," JA 139-40. There is no evidence as to when this occurred.

unequivocally determined that a warrant must state "when it takes effect." That determination is consistent with Respondent's position and supports the Ninth Circuit's rule.

The rule Respondent advocates – that a precondition to a warrant's validity must be made manifest in the warrant itself – is a limited rule with an intelligible principle. Not every fact need be particularly stated on the face of the warrant. Rather, a precondition to the valid exercise of executive power must be made manifest in the warrant itself. In the normal course, this is met by describing the place to be searched and the items to be seized. For an anticipatory warrant, this also requires that the triggering condition be specified. But there is no danger of a slippery slope here. Generally, there are no additional preconditions to the validity of a warrant. It is only in the special case of anticipatory warrants that this question of application arises. Thus, there are no legitimate concerns that requiring the triggering condition to be particularly stated will result in confusion or additional litigation over the further particularities for warrants. The principal at work here is clear: if there is a precondition to the valid exercise of executive power, that precondition must be particularly identified on the face of the warrant.[17]

The Government argues that the triggering condition only goes to the probable cause requirement and therefore need not be particularly described. See Pet. Br. 19 ("[T]he text of the Fourth Amendment *does* address the issue. The triggering condition for an anticipatory warrant is an element of probable cause."); *id.* at 24. But this argument is both atextual (contrary to the Government's self-serving description) and entirely question begging. In essence, the Government maintains that Court should consider the "triggering

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[17] As a practical matter, to be valid, warrants must specify a number of particulars beyond place to be searched and items to be seized. For example, the issuing court is specified so that the recipient of the warrant can understand from where the power to search emanates.

condition" to be part of the probable cause showing made to the magistrate. But that does nothing to resolve the admitted problem of the anticipatory nature of that condition, the consequent absence of probable cause at the time of issuance, and the textual bar to the issuance of such warrants. Simply put, the Government contends that the "triggering condition" should be assumed and that the constitutional analysis should be no different than if it were an extant fact. Again, that does nothing more than wish away the problem.

In fact, the triggering condition itself does nothing to *support* probable cause. The fact that the warrant is not operable until a video tape is delivered, for example, does absolutely nothing to establish probable cause. Instead, the triggering condition provides a clear limit on the authority and power of the executing officers. And this is a distinction with a difference in the Fourth Amendment context.

The Fourth Amendment does not require that probable cause be shown on the face of the warrant. This is because probable cause is a legal conclusion that is reached through a complicated balancing of numerous factors. Therefore, a neutral magistrate's decision as to whether probable cause exists is sufficient. In the case of an anticipatory warrant, however, the triggering condition, by definition, has not been determined to have occurred by the magistrate. Instead, the magistrate has stated that *if* the event occurs, the warrant can be executed. And in this capacity, the triggering condition does affect probable cause – probable cause to search is absent until it occurs. The triggering condition also provides an objective limitation on the power of the executing officer. In this way, the triggering condition is similar to the place to be searched or thing to be seized. It provides an objective factual criteria, which must be present for the valid execution of the warrant. If the officer comes to the wrong house, they have no power to enter. Similarly, the officer has no power to execute the warrant in advance of the occurrence of the triggering condition. If a warrant fails to list particularly the

place to be searched, that warrant is invalid. So too if the warrant omits the triggering condition.

The Government tries to justify its rule by stating that anticipatory warrants provide greater protection than any potential alternative. Pet. Br. at 22-23. This argument is a non-sequitor.[18] Whether or not anticipatory warrants may be useful in some cases has absolutely nothing to do with the requirements that attend to those warrants. That the particularity requirement applies to the triggering condition does not render anticipatory warrants a useless tool. To the contrary, all that this would require is some additional words included on the face of the warrant. The Government additionally states that there is a preference for warrants because they provide the unbiased scrutiny of a judicial officer. See *id.* at 23. Ironically, however, it is the Government's rule that would undermine this very scrutiny. The Government's attempt to seek support in the neutral magistrate for its argument that the particularity requirement does not attend to the triggering condition is passing strange in light of the real consequences of the Government's rule.

The fact that the triggering condition may have in fact occurred prior to a search does not insulate that search from challenge. "Even though petitioner acted with restraint in conducting the search, 'the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer.'" *Groh*, 540 U.S. at 561 (quoting *Katz*, 389 U.S. at 356). A search is invalid if it was conducted pursuant to a warrant that impermissibly failed to identify the power to search and the limits of that power and also conferred discretion on the executing offers. Permitting such a search is anathema to the underlying purpose of the Fourth Amendment. The Ninth Circuit's rule should be affirmed.

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[18] The argument is also incorrect. In the face of telephonic warrants, there is an alternative that both safeguards the interests protected by the Fourth Amendment and permits fast police work. *See supra*, Part I.B.

"A contrary rule would, of course, render the warrant requirements of the Fourth Amendment meaningless." *Whiteley*, 401 U.S. at 565 n.8.

C. The History Of The Fourth Amendment Provides Further Support That The Triggering Condition Must Be Particularly Stated On The Face Of The Warrant.

An anticipatory warrant that lacks a particular description of the triggering condition confers upon law enforcement officers significant discretion, which is anathema to the history of the Fourth Amendment. In fact, the Fourth Amendment embodies the Framers' hostility to precisely such grants of authority to officers. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 578 (1999) (explaining that the "delegation of discretionary authority to ordinary, 'petty,' or 'subordinate' officers was anathema to framing-era lawyers"). The Framers' particular concern with the substance of broad discretion was much the same as expressed here—the perceived need to limit the broad discretion of officers to conduct intrusive searches of homes and to thereby disrupt the privacy of the residents and the community's sense of ordered liberty. See William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning, 602-1791*, at 237 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School, on file with UMI Dissertation Services) ("[G]eneral searches and warrants . . . furnished an infinite power of surveillance to searchers that exposed every Englishman's dwelling to perpetual, capricious intrusion."). As here, the general warrant conferred upon common officers significant power to search and arrest at their discretion. The Framers found this authority especially pernicious given their general distrust of the judgment of common officers. As a result, the restrictions that ultimately became the Fourth Amendment were a central feature of the compromise between the Federalists and the Anti-federalists that made way for the new

federal charter. Davies, *supra*, at 609-11; see also Cuddihy, *supra*, at 1365-79. So strong was the acclamation for such a provision that it was already a feature of many State constitutions at the time the Framers drafted our Constitution. See Cuddihy, *supra*, at 1233-54, 1298-341, 1347-51 (discussing search and seizure in state constitutions). Accordingly, any conferral of the type of authority granted by anticipatory search warrants requires careful scrutiny against a backdrop of well over 200 years of unmitigated hostility to such power.

The lack of particularity in anticipatory warrants likewise represents a departure from the Framers' express intent to strictly limit "unreasonable search and seizures." While the Framers held a great distrust for the common officer, they were unconcerned with passing a congressional standard to regulate the warrantless officer as "they did not perceive ordinary officers as possessing any significant discretionary authority . . . to initiate arrests or searches." Davies, *supra* at 578. Warrants, and not officers, were the main source of search and arrest authority. Framing-era common law gave no more arrest authority to common officers than it did to the general public, which mandated that a warrantless arrest could be justified only by "felony in fact," and nothing so loose as a general standard of "reasonableness." *Id.* Given the limited power of the warrantless officer, the Framers intended to "control the officer by controlling the warrant," and had little reason to believe that the warrant requirement – including the requirement for particularity – would not effectuate such control. See *id.* at 552. Here, however, the Government would not only confer authority upon officers to create probable cause (e.g., by delivering the video-tape), but would also allow them to seek and obtain a warrant where no probable cause existed at the time it was sought. Far from "controlling the warrant," the Government seeks to guarantee "reasonableness through reliance upon the good will of officers, a "deference" that is decidedly "at odds with the

central purpose of the Fourth Amendment, which is distrust of discretionary police power." Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 Wm. & Mary L. Rev. 197, 248 (1993).

D. Requiring That The Triggering Condition Be Particularly Stated Imposes No Significant Burden On Law Enforcement.

Requiring that law enforcement include the particularly described triggering condition on the face of the warrant poses no significant burden on law enforcement. This rule is nearly costless to implement, in terms of money, effort, and time. The Government essentially conceded this point. Pet. Br. at 27 ("[T]he burden of describing the triggering condition in an anticipatory warrant (or incorporating the supporting affidavit into the warrant and showing it to the person whose property is being searched) may be minimal.").

After acknowledging that there is no real burden on law enforcement, the Government argues that the rule would nonetheless be costly because the "consequences of an inadvertent failure to comply with the Ninth Circuit's rule are" severe. *Id.* However, there is little reason to fear inadvertent failure to comply with a rule that triggering events be plainly stated on the warrant. As a practical matter, anticipatory warrants are used in the sorts of investigations that involve relatively specialized officers (such as DEA agents in drug cases or postal inspectors in child pornography cases). These specialized officers are capable of learning a simple rule about anticipatory warrants. In any event, "it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded." *Berger*, 388 U.S. at 63.

And again, the Government's argument proves too much. This Court has unequivocally decided that suppression is necessary to "effectuate the guarantee of the Fourth

Amendment against unreasonable searches and seizures" by deterring future constitutional violations. *United States* v. *Calandra*, 414 U.S. 338, 347 (1974). That the remedy of exclusion exists cannot be the basis for altering Constitutional mandates in the first instance. The Court should reject such "cart-before-the-horse" sophistry. Determining the contours of a constitutional rule and whether there has been a constitutional violation has nothing whatever to do with the remedy available. The Government's argument on this score is utterly unhelpful in determining what the constitution requires in the context of anticipatory warrants.

E. Petitioner's Argument That Any Potential Error Can Be Remedied By Suppression Is Both Unconvincing And Incorrect.

One of the central themes in the Government's brief is that any potential error can always be remedied by after-the-fact review. But this turns the Fourth Amendment on its head. The Fourth Amendment was designed to guarantee ex ante review by a neutral magistrate. Review in hindsight is simply not sufficient. The point is that it is not acceptable to "bypass the safeguards provided by an objective predetermination of probable cause," and instead substitute "the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck* v. *Ohio*, 379 U.S. 89, 96 (1964). Yet this is precisely what the Government proposes.

The Government argues that any potential error can be cured after the fact, by way of a motion to suppress or an action for damages. *E.g.*, Pet. Br. at 20-21. As a practical matter, however, there is no action for damages *unless* there is a clear constitutional rule as to what the warrant must state on its face. See *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987) (finding that officers have qualified immunity against section 1983 damage actions unless "the contours of the right [are] sufficiently clear that a reasonable official would

understand that what he is doing violates that right"). If the warrant in this case is permitted – and thus there is no clear requirement that the triggering event be stated on the face of the warrant – there will be no possibility that any damages action could be sustained for an abuse of an anticipatory warrant.

Similarly, there is no suppression for evidence seized under an invalid warrant unless there is a glaring facial deficiency. See *United States* v. *Leon*, 468 U.S. 897, 922-23 (1984). But there cannot be a facial deficiency unless there is a rule that requires the triggering event be stated with particularity. Although the Government would have this Court believe that there is no need to create a clear rule as to the triggering condition, without such a rule, all of the alternative remedies the Government offers are just smoke and mirrors. In the absence of a clear rule, neither suppression nor money damages will be awarded.

Individuals searched generally have to defer any probable cause challenge to a post-search procedure. In fact, the very justification for permitting the remedy for lack of probable cause to be deferred is *because* a neutral magistrate has already determined that probable cause exists. Thus, there is a built-in safeguard. A triggering condition in an anticipatory warrant is qualitatively different. The magistrate has never passed upon the occurrence of the triggering condition. Thus, the basis for permitting the deferral of review is lacking. Moreover, the existence of a triggering condition does not present a question similar to probable cause, which asks how much. A triggering condition is an on/off switch – it either exists or it does not; the warrant is valid or not. There is no weighing and balancing, and there is simply no need to defer review until after the fact. The point is that the person searched is entitled to know the limits of the power of the executing officer. And this purpose can never be served by after-the-fact suppression.

The Government's suggestion that no challenge to the warrant should be made upon execution, is entirely self-serving. Peaceable challenge to the specifics of a search warrant is entirely consistent with the exercise of constitutional rights. Where, as here, the wrong person was in possession of the contraband, such a challenge may be eminently reasonable and efficient. More obvious cases also come to mind – such as cases of mistaken identity or mistaken location – and in such cases, reasonable questioning by the inhabitants should be welcomed by the Government, not discouraged or postponed to subsequent litigation.

Finally, the Government argues that even if the triggering condition must be particularly described, suppression is not an appropriate remedy as long as the triggering condition has in fact been met. But the fact that discretion may have been appropriately exercised does not save the warrant because any restraint was "imposed by the agents themselves, not by a judicial officer." *Katz*, 389 U.S. at 356. Just as the *Groh* warrant was facially invalid, so too here. Because the warrant is invalid, the search of Grubbs' home was warrantless. And warrantless searches of a person's home are deemed unreasonable and unconstitutional.

The Government's argument that any constitutional defect is harmless as long as the triggering condition has actually occurred misses the point. That argument depends on the Government's flawed assertion that the triggering condition goes only to probable cause. It does not; it actually establishes a precondition to the warrant's validity. And to the extent it does, the Government is essentially conceding that probable cause has not been finally determined by the neutral magistrate. The Government cites to cases in which courts have remedied searches found to exceed the scope of the probable cause determination by severing parts of the warrant that are invalid. Pet. Br. at 31. And this makes sense. In that context, the warrant is valid; it is simply overbroad. When a warrant fails to conform to the particularity

requirement in toto, however, it is invalid. Petitioner cites no case law suggesting that an *invalid* warrant can be saved through severance. The cases relied on by Petitioner are beside the point as they do not resolve the issue presented here.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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No. 04-1414

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY GRUBBS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent's principal defense of the judgment invokes a theory on which the court of appeals itself did not rely: that anticipatory search warrants are unconstitutional per se. Not only was that theory not adopted by the Ninth Circuit, it was not raised by respondent in either of the lower courts or at the petition stage in this Court, and it is not fairly included within the question on which certiorari was granted (which, tellingly, is quite different from the question presented that prefaces respondent's brief). In any event, as every court of appeals to consider the question, including the Ninth Circuit, has held, anticipatory warrants are "perfectly consistent with the Constitution." *United States* v. *Gendron*, 18 F.3d 955, 965 (1st Cir.) (Breyer, C.J.), cert. denied, 513 U.S. 1051 (1994).

Respondent also defends the Ninth Circuit's holding that the particularity requirement of the Fourth Amendment applies to the triggering condition for the search. Respondent contends that a search under an anticipatory warrant is invalid, and a search is effectively

warrantless, whenever the triggering condition is not set forth either in the warrant itself or in an affidavit that is both incorporated into the warrant and shown to the person whose property is being searched—even if the search takes place *after* the triggering event occurs and proceeds in accordance with the terms of the warrant. Respondent's defense of that rule lacks merit. The Particularity Clause applies only to the "place to be searched" and "the persons or things to be seized," and this Court should decline, as it has elsewhere, see *Dalia* v. *United States*, 441 U.S. 238 (1979), to add requirements to the Warrant Clause's "precise and clear" text, *id.* at 255 (quoting *Stanford* v. *Texas*, 379 U.S. 476, 481 (1965)). The absence of a triggering condition is not a defect in particularity that renders the warrant a nullity.

A. Anticipatory Search Warrants Are Not Per Se Unconstitutional

Respondent contends, for the first time in this Court, that anticipatory warrants violate the Fourth Amendment's requirement that "no Warrants shall issue, but upon probable cause." Respondent did not raise that claim in district court or in the court of appeals. See Resp. C.A. Br. 17-34; Resp. C.A. Reply Br. 2-7; Resp. C.A. Opp. to Gov't Pet. for Rehr'g 2-15. Nor did those courts pass on the issue. This Court ordinarily does not decide an issue that was not pressed or passed upon below, even when it is raised by the respondent in defense of the judgment. See, *e.g.*, *Heller* v. *Doe*, 509 U.S. 312, 318-319 (1993); *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38-40 (1989). Respondent also cannot claim that his contention is encompassed within the question on which the Court granted certiorari. The question whether anticipatory warrants are per se violative of the

Fourth Amendment is not a "subsidiary question fairly included" within the question in the petition. Sup. Ct. R. 14.1(a). Finally, respondent did not raise his claim in his brief in opposition. See Br. in Opp. 3-9. Under this Court's Rules, "[a]ny objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition." Sup. Ct. R. 15.2.[1]

In the event the Court does entertain the claim, it should hold that anticipatory search warrants are entirely consistent with the Fourth Amendment. As then-Chief Judge Breyer observed in *Gendron*, and as respondent concedes in his brief (at 12 & n.8), the courts of appeals have uniformly "found 'anticipatory warrants,' considered as a class, perfectly consistent with the Constitution." 18 F.3d at 965. Indeed, all but one of the twelve courts of appeals with criminal jurisdiction have addressed the contention that anticipatory warrants are per se unconstitutional, and every one of them, including the Ninth Circuit, has rejected it. See *United*

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[1] In certain instances, the Court has exercised discretion to reach an issue not raised in the brief in opposition where resolving the issue was a "predicate to an intelligent resolution" of the question presented. *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996); cf. *Wilkinson* v. *Austin*, 125 S. Ct. 2384, 2393 (2005) (determining, despite the State's concession in its certiorari petition and brief that inmates had a due process liberty interest, to resolve the issue on the merits; explaining that "[w]e need reach the question of what process is due [*i.e.*, the question presented in the petition] only if the inmates establish a constitutionally protected liberty interest, so it is appropriate to address this threshold question at the outset"). In those cases, however, unlike in this one, the threshold issue had been decided in the courts below.

States v. *Santa*, 236 F.3d 662, 671-672 (11th Cir. 2000) (citing cases).[2]

1. Anticipatory warrants are issued upon probable cause

Respondent contends that anticipatory warrants are unconstitutional because "probable cause does not exist at the time of [their] issuance" (Br. 15), and they are therefore "not issued 'upon probable cause,' as the Constitution unambiguously requires" (Br. 14). That is not correct. Anticipatory warrants are consistent with the requirement that probable cause "exist when the magistrate judge issues the search warrant" because "such warrants are, when properly issued, supported by probable cause." *Santa*, 236 F.3d at 672 (quoting *United States* v. *Harris*, 20 F.3d 445, 450 (11th Cir.), cert. denied, 513 U.S. 967, 1031 and 1032 (2004)) (footnote omitted). Before an anticipatory warrant may issue, "the magistrate must determine, based on the information presented in the warrant application, that there is probable cause to believe the items to be seized will be at the designated place when the search is to take place." *United States* v. *Rowland*, 145 F.3d 1194, 1201 (10th Cir. 1998). In that fundamental respect, an anticipatory warrant does not differ from a traditional warrant, for "even a warrant based on [the] known presence of contraband at the premises rests on the expectation that the contra-

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[2] The unanimous view of the circuits is shared by a "leading authority on the Fourth Amendment." *California* v. *Acevedo*, 500 U.S. 565, 577 (1991). See 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.7(c), at 400-402 (4th ed. 2004). Moreover, insofar as they "permit[] anticipatory warrants," see Fed. R. Crim. P. 41 advisory committee's notes (1990 Amendments), the Federal Rules of Criminal Procedure, which have been adopted by this Court, see 495 U.S. 969 (1990), presume their constitutionality.

band will be there when the warrant is executed." *Santa*, 236 F.3d at 672. Accord *United States* v. *Garcia*, 882 F.2d 699, 702 (2d Cir.), cert. denied, 493 U.S. 943 (1989). Indeed, the question whether "there is probable cause to think that the contraband will be at the place to be searched at the time of the contemplated intrusion" is "the focal point of the magistrate's inquiry" for either type of warrant. *United States* v. *Ricciardelli*, 998 F.2d 8, 11 (1st Cir. 1993). The only difference is that the probable cause outlined in the application involves a contingency that, though likely to occur, has not yet taken place. Thus, when an anticipatory warrant is requested, the magistrate must "widen his horizons to take into account the likelihood that the triggering event will occur on schedule and as predicted in making his probable cause determination." *Ibid.* Accord *Rowland*, 145 F.3d at 1201.

That difference does not make anticipatory warrants constitutionally problematic. On the contrary, as then-Chief Judge Breyer observed in *Gendron*, anticipatory warrants may "offer greater, not lesser, protection against unreasonable invasion of a citizen's privacy." 18 F.3d at 965. That is because "the facts put forward in support of an anticipatory search warrant predicated on the planned delivery of contraband to a particular location" ordinarily establish "a greater likelihood that the contraband will be found there at the time of the search (which will be contemporaneous with the arrival of the contraband, or nearly so)" than the "facts put forward in support of a more conventional search warrant predicated on the known recent location of contraband at the proposed search site." *Ricciardelli*, 998 F.2d at 11. Accord *Gendron*, 18 F.3d at 965; 2 Wayne R. LaFave,

Search and Seizure: A Treatise on the Fourth Amendment § 3.7(c), at 402-403 (4th ed. 2004).

The fact that anticipatory warrants depend on "the occurrence of a future event" (Resp. Br. 9) does not undermine their validity. Indeed, as respondent seems to recognize, all electronic surveillance involves probable cause determinations based on the likely "occurrence of a future event." *Ibid.* When officers "are permitted to tap a public telephone because one individual is thought to be placing bets over the phone," *Scott* v. *United States*, 436 U.S. 128, 140 (1978), the warrant is based on the predicted future "occurrence" of the bettor using the phone—an event that officers in the field must determine has occurred on the scene by observing the phone or listening to calls. Yet the dependence of the warrant on that future event observed by the officers hardly prevents the issuance of the warrant. As the First Circuit has noted, a warrant for a wiretap "can appropriately be viewed as an anticipatory warrant for the seizure of words: the magistrate issues the warrant on the basis of a substantial probability that crime-related conversations will ensue." *Ricciardelli*, 998 F.2d at 11 n.3. "Clearly," as the court concluded, "such warrants are permitted under the Fourth Amendment." *Ibid.* (citing, *inter alia*, *Katz* v. *United States*, 389 U.S. 347 (1967)).

Respondent also contends that anticipatory warrants are unconstitutional because "[t]he point of the Fourth Amendment is to limit the discretion of law enforcement" (Br. 13), and anticipatory warrants "leave to the executing officer the power to determine" when the triggering event has occurred (Br. 15). Respondent's amici make the same argument. NACDL Br. 24-27; NAFD Br. 6-12. As explained in the government's opening brief, however, the discretion of officers in executing an

anticipatory warrant is severely circumscribed by the requirement that the triggering condition be "explicit, clear, and narrowly drawn," see U.S. Br. 23-24 (citing cases), either in the warrant itself or in the supporting affidavit. In this case, for example, the affidavit specified that the warrant would be executed only if respondent "or any other individual at the residence accepts the mail package containing the videotape and takes it into 1199 Park Terrace Drive, Galt, CA 95632." Pet. App. 57a. Accord *id.* at 72a. In view of the particularity of that language, the executing officers had virtually no discretion in determining when the triggering event occurred, and thus when the search could take place. And law enforcement officers have no incentive to execute an anticipatory warrant *before* the triggering event occurs, because, if they do, evidence will likely be suppressed in the criminal case and the officers may be civilly liable. See U.S. Br. 20-21, 30-34.

2. Anticipatory warrants serve valid law enforcement interests that telephonic warrants do not

The virtue of anticipatory warrants is that they obviate the need to choose between "allow[ing] the delivery of contraband to be completed before obtaining a search warrant, thus risking the destruction or disbursement of evidence," and "seizing the contraband on its arrival without a warrant, thus risking suppression." *Ricciardelli*, 998 F.2d at 10. Respondent (Br. 15-16) and an amicus (NAFD Br. 12-23) contend that anticipatory warrants are unnecessary, because telephonic warrants, obtained *after* the contraband is delivered to the location to be searched, are just as effective. That is not correct.

As the Ninth Circuit itself has recognized, "obtaining a telephonic warrant is not a simple procedure." *United*

States v. *Lindsey*, 877 F.2d 777, 782 (1989).[3] Quite apart from the risk of equipment malfunction and magistrate unavailability at the critical moment, "[t]here still will be exigencies"—the most obvious being the possible destruction or distribution of the contraband upon its delivery—that make it "[in]feasible to obtain even a telephonic warrant." 3A Charles A. Wright et al., *Federal Practice and Procedure* § 670.1, at 310 (3d ed. 2004). Cases will arise, therefore, in which obtaining a telephonic warrant after delivery is not an option, and the only two possibilities are obtaining an anticipatory warrant before delivery and "simply conduct[ing] [a] search (justified by 'exigent circumstances') without any warrant at all." *Gendron*, 18 F.3d at 965. Because the Constitution has a "strong preference for warrants," *United States* v. *Leon*, 468 U.S. 897, 914 (1984), a search under an anticipatory warrant is preferable to a warrantless search.

In the alternative, respondent's amicus contends that, even if the availability of telephonic warrants does not render anticipatory warrants unconstitutional per se, they "should be prohibited unless law enforcement

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[3] At least in the federal system, the applicant must not only communicate the basis for the warrant, see Fed. R. Crim. P. 41(d)(3)(A), but also prepare a "proposed duplicate original warrant" and "read or otherwise transmit the contents of that document verbatim" to the magistrate judge, Fed. R. Crim. P. 41(e)(3)(A). For his part, the magistrate judge must "make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing," Fed. R. Crim. P. 41(d)(3)(B)(ii), and must "enter the contents" of the "proposed duplicate original warrant" into an "original warrant," Fed. R. Crim. P. 41(e)(3)(B). The magistrate judge may also direct the applicant to modify the "proposed duplicate original warrant," in which case the "original warrant" must be modified as well. Fed. R. Crim. P. 41(e)(3)(C).

officials can set forth objective reasons why a telephonic warrant would not be feasible under the circumstances." NAFD Br. 24. In particular, respondent's amicus argues that the issuance of an anticipatory warrant should require officers to "present objective evidence at the time of the warrant application that the contraband is likely to be immediately destroyed or disseminated upon delivery." *Ibid.* That argument should also be rejected.

As this Court has observed, the circumstances that will "confront the officers" at the time of the search cannot be "anticipated in every particular" at the time of the warrant application, and thus exigent circumstances cannot always "be demonstrated ahead of time." *Richards* v. *Wisconsin*, 520 U.S. 385, 396 & n.7 (1997). If the rule proposed by respondent's amicus were adopted, therefore, there would be cases in which an anticipatory warrant was not issued *before* the delivery, because the government could not make the requisite showing; exigent circumstances arose *after* the delivery, such that there was insufficient time to apply for a telephonic warrant; and the government was consequently required to conduct a warrantless search. Because exigencies are not always foreseeable, and because a search pursuant to an anticipatory warrant is constitutionally superior to a search without any warrant, the issuance of an anticipatory warrant should not require a showing of "reasonable cause to believe that the contraband would be destroyed or * * * disseminated so quickly after delivery that there would not even be time to procure a telephonic warrant." NAFD Br. 24.[4]

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[4] Respondent contends that, even if the warrant in this case was not "*issued* in the absence of probable cause," it was "*executed* in the absence of probable cause." Br. 10 n.7. Respondent's theory is that the offense at issue requires the *knowing* receipt of child pornography; that

B. The Particularity Requirement Of The Fourth Amendment Does Not Apply To The Triggering Condition For An Anticipatory Search Warrant

Respondent's arguments in defense of the Ninth Circuit's actual holding are likewise without merit.

1. The Ninth Circuit held that "the particularity requirement of the Fourth Amendment applies with full force to the conditions precedent to an anticipatory search warrant." Pet. App. 13a. The fundamental flaw in that holding is that it adds an additional requirement to those that actually appear in the Warrant Clause: that "no Warrant shall issue, but [1] upon probable cause, [2] supported by Oath or affirmation, and [3] particularly describing the place to be searched, and the persons or things to be seized." See U.S. Br. 13-16.

In *Dalia* v. *United States*, 441 U.S. 238 (1979), this Court rejected a virtually identical attempt to add a requirement to those three requirements of the Warrant Clause. In *Dalia*, the defendant argued that if an order authorizing electronic surveillance is to be implemented

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the triggering condition described in the affidavit was receipt of the package by *anyone*; that there could not be a knowing receipt unless respondent *himself* received the package; and that the search took place after respondent's *wife* received the package. *Ibid.* Respondent did not make that factbound argument either in the court below or in his brief in opposition, and it is clearly not fairly included within the question on which the Court granted certiorari. In any event, the argument lacks merit. Respondent ordered and paid for a videotape depicting child pornography, and he requested that it be delivered to his home. Pet. App. 4a, 29a-30a, 59a-60a, 63a-64a, 67a. Regardless of whether it was respondent or his wife who accepted delivery, there was clearly probable cause to believe that the videotape belonged to respondent, that it would be in the house, and thus that respondent's "residence likely contain[ed] evidence of his criminality." *Ricciardelli*, 998 F.2d at 14.

by a covert entry to install the listening device, the authorizing court's order must "explicitly set forth its approval of such entries before the fact." *Id.* at 255. This Court rejected that contention. Noting that the three requirements of the Warrant Clause are "precise and clear," *ibid.* (quoting *Stanford* v. *Texas*, 379 U.S. 476, 481 (1965)), the Court held that additional requirements should not be added:

> Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that, in addition to the three requirements discussed above, search warrants also must include a specification of the precise manner in which they are to be executed.

Id. at 257. The Court explained that, "[o]n the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant." *Ibid.* See also *ibid.* ("the specificity required by the Fourth Amendment does not generally extend to the means by which warrants are executed").

Respondent contends that the text of the Fourth Amendment "does not * * * resolve" the question whether the particularity requirement applies to the triggering condition for a search under an anticipatory warrant, because the particularity requirement "presumes the existence of probable cause at the time of issuance" and an anticipatory warrant is "issued in the absence of a showing of present probable cause." Resp. Br. 17. The particularity requirement, however, describes what the warrant must say about the *place* and *objects* of the search; it has nothing to do with the presence (or absence) of probable cause to conduct it, which

is a distinct constitutional requirement. In any event, as explained above, see pp. 4-6, *supra*, probable cause *does* exist at the time an anticipatory warrant is issued.

In the alternative, respondent contends that the triggering condition must be identified on the face of an anticipatory warrant because it is "a necessary additional component of the identification of the place to be searched and thus is encompassed by the requirement that the place be particularly stated." Br. 18 n.13. That is obviously not correct. The triggering condition bears on whether there is probable cause to believe that a search of a particular location will yield specified evidence at the time of the search; it has no bearing on the warrant's identification of the *location* of the search.[5]

2. In holding that the particularity requirement applies to the triggering condition for an anticipatory warrant, the Ninth Circuit relied principally on considerations of policy. Those considerations cannot justify reading an additional requirement into the Particularity Clause. U.S. Br. 16-17, 20-24. Among other things, the Ninth Circuit's decision cannot be justified on the theory that applying the Particularity Clause to the triggering condition is the only way of ensuring that citizens are able to police the conduct of the searching officers. That is because the Fourth Amendment does not "require[] the executing officer to serve the warrant on the owner

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[5] Moreover, even when the specifics of the underlying theory of probable cause have a bearing on the location, *e.g.*, that the address specified in the warrant is the subject's girlfriend's house, that additional information need not appear on the face of the warrant. The particularity requirement simply does not extend beyond the place to be searched and things to be seized to include details about the supporting theory of probable cause.

before commencing the search." *Groh* v. *Ramirez*, 540 U.S. 551, 562 n.5 (2004); see U.S. Br. 21-22.

In defense of the Ninth Circuit's "policing" rationale, respondent contends that the government's argument "would seemingly justify disregarding the particularity requirement in toto." Br. 20 n.15. That is clearly not so. The particularity requirement cannot be disregarded, because the Fourth Amendment, by its terms, requires that warrants specify the place to be searched and the items to be seized. But the Particularity Clause does *not*, by its terms, require that anticipatory warrants specify the triggering condition. The purported need of citizens to monitor searches cannot justify reading such a requirement into the Fourth Amendment, because, as Judge Posner has explained, a warrant "cannot enable the occupant to monitor the search if he doesn't see it until the search has been completed." *United States* v. *Stefonek*, 179 F.3d 1030, 1034 (7th Cir. 1999), cert. denied, 528 U.S. 1162 (2000).[6]

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[6] Respondent also notes that this Court left open in *Groh*, 540 U.S. at 562 n.5, the question whether it would be unreasonable to refuse a *request* to provide the warrant at the outset of the search when there is no threat to officer safety. He argues that, "[g]iven [his] wife's continued inquiries and requests, it was unreasonable to refuse to provide her with a warrant at the outset of the search." Br. 20 n.15. Respondent did not raise that argument either in the court below or in his brief in opposition, and it is not fairly included within the question on which the Court granted certiorari. In any event, the question reserved in *Groh* is not presented in this case, because, whatever respondent's wife may have said to the searching officers (see Resp. Br. 2), respondent points to no evidence that she ever requested a copy of the warrant. Indeed, her testimony at the suppression hearing was to the contrary. See J.A. 105 ("Q. Did you ask to see—did you say do you have a warrant? A. No, I didn't."). And the officers *did* provide respondent with a copy of the warrant (although not the affidavit) about 30 minutes after the officers approached the house (during which time they conducted

Respondent also contends that the triggering condition must be stated on the face of an anticipatory warrant in order to safeguard other "interests protected by the Fourth Amendment"—namely, "remov[ing] discretion from the executing officer," and "assur[ing] the individual whose property is searched * * * of the lawful authority of the executing officer, his need to search, and the limits of his power to search." Br. 19 (quoting *United States* v. *Chadwick*, 433 U.S. 1, 9 (1977)). Because an officer has "no lawful authority" before the triggering event occurs, respondent argues, an anticipatory warrant that does not specify the triggering condition "does not identify the power of the executing officer, or the limits of her power, and it does not provide any check upon her discretion." *Id.* at 20-21. Respondent's argument ultimately reduces to a request that the Court adopt the rule that, "if there is a precondition to the valid exercise of executive power, that precondition must be particularly identified on the face of the warrant." *Id.* at 23. Whatever merit such a rule might have as a matter of policy, however, it cannot be found in the Fourth Amendment, which indisputably sets "precondition[s] to the valid exercise of executive power" that need *not* be "particularly identified on the face of the warrant." For example, the first "precondition to the valid exercise of executive power" listed in the Warrant Clause is that a warrant be supported by probable cause. Yet the Fourth Amendment does not require the fact that there is probable cause for the search to be "particularly identified on the face of the warrant," such

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a protective sweep, checked the children's backpacks before they left for school, and took photographs of the house). Pet. App. 31a-32a.

that a warrant that omits that information is facially invalid.[7]

3. As explained in the government's opening brief (Br. 18-19), the history of the Fourth Amendment confirms that those who framed and ratified it did not intend warrants to include information beyond that required by the constitutional text. Respondent disagrees, contending (Br. 26-28) that the history of the Fourth Amendment supports the Ninth Circuit's rule. According to respondent, the historical evidence demonstrates that the Fourth Amendment was largely a response to the use of general warrants, which "conferred upon common officers significant power to search * * * at their discretion," and that the Fourth Amendment thus "embodies the Framers' hostility" to the conferral of "broad" and "significant" discretion on law enforcement officers. Br. 26. That statement does generally describe the historical impetus for the Fourth Amendment, see U.S. Br. 18-19, but it provides no support for the Ninth Circuit's rule. The Framers translated their hostility to general warrants into a specific particularity requirement; the language of that constitutional requirement does not extend to triggering conditions for anticipatory warrants.

Amici NACDL et al. claim that the goal of the particularity requirement was "to delineate boundaries to the officer's search-and-seizure authority that leave *no* room for on-the-scene judgment calls" and that "[i]t is only a little exaggeration to suggest that if the Framers could

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[7] Nor does the Fourth Amendment require the fact that the showing of probable cause was "supported by Oath or affirmation," U.S. Const. Amend. IV (Warrant Clause), to be "particularly identified on the face of the warrant," despite the fact that it, too, is a "precondition to the valid exercise of executive power."

have required that searches and seizures be conducted by programmable automatons, they would have done so." Br. 25. That is a difficult theory to test, but in all events it is manifestly not what the Court's cases hold. As the Court explained in *Dalia*, "[o]ften in executing a warrant the police may find it necessary to interfere with privacy rights not explicitly considered by the judge who issued the warrant." 441 U.S. at 257. But "[i]t would extend the Warrant Clause to the extreme to require that, whenever it is reasonably likely that Fourth Amendment rights may be affected in more than one way, the court must set forth precisely the procedures to be followed by the executing officers." *Id.* at 258.

Many warrant-execution tasks require on-the-scene judgment. For example, officers are entitled to use judgment in seizing an incriminating item that is *not* listed in the warrant but is found in plain view during the course of the search, so long as the officers determine that "its incriminating character [is] immediately apparent." *Horton* v. *California*, 496 U.S. 128, 136 (1999) (internal quotation marks omitted). Officers must also determine the limits of an authorized search, once it appears that a residence varies from the description in the warrant, *Maryland* v. *Garrison*, 480 U.S. 79, 87 (1987); whether exigent circumstances justify dispensing with a knock and announcement, *Richards* v. *Wisconsin*, 520 U.S. 385, 395-396 & n.7 (1997); whether occupants should be detained during the execution of the search, *Michigan* v. *Summers*, 452 U.S. 692 (1981); and, if occupants are to be detained, whether they should be handcuffed and for how long, *Muehler* v. *Mena*, 125 S. Ct. 1465 (2005). See also *Scott* v. *United States*, 436 U.S. 128, 140 (1978) (agents have the statutory responsibility

under 18 U.S.C. 2518(5) to "conduct [electronic] surveillance in such a matter as to 'minimize' the interception of [non-relevant] conversations," which includes interpreting calls that may be "ambiguous in nature or apparently involv[ing] guarded or coded language"). In light of those cases, there is no justification for construing the Fourth Amendment to treat officers as though they were "automatons." NACDL Br. 25.

In any event, the reality is that, in carrying out the "almost ministerial" (*Ricciardelli*, 998 F.2d at 12) task of determining whether events satisfy a precisely stated triggering condition, an officer executing a properly issued anticipatory warrant has virtually no discretion. The officer has no authority to search until the occurrence of the triggering event, which must be "explicit, clear, and narrowly drawn," see *id.* at 23, and which, as in this case, see Pet. App. 57a, 72a, ordinarily entails the delivery of a package to a particular address, its receipt by a person living there, and its transportation inside. Ascertaining that those events have occurred is no more complex than ascertaining that officers have arrived at the correct address listed in the warrant. If the officer ignores the limits on his discretion, and searches before the triggering event occurs, the result is likely to be suppression, and possibly civil liability.

4. While the burden of describing the triggering condition in an anticipatory warrant may be minimal, the consequence of an inadvertent failure to comply with the Ninth Circuit's rule—namely, suppression—is not. U.S. Br. 27-29. Respondent contends that "there is little reason to fear inadvertent failure to comply with [the] rule," because anticipatory warrants are ordinarily prepared and executed by "specialized officers," who are "capable of learning a simple rule." Br. 28. But even if

any one addition to the Constitution's specification of what a warrant must contain is easy enough to implement, once the courts go beyond the constitutional text, there is no obvious limit for what should be included. And even an officer who is "specialized" is as apt to make an honest mistake as one who is not. In *Groh*, for example, the officer who prepared the warrant to search for firearms had been a Special Agent with the Bureau of Alcohol, Tobacco and Firearms for more than seven years, and yet he inadvertently omitted information that is indisputably required by the Fourth Amendment: he "failed to identify any of the items that [he] intended to seize." 540 U.S. at 554.

Respondent contends that the government's argument "proves too much," because suppression is the acknowledged remedy for an unreasonable search and can have no bearing on "whether there has been a constitutional violation" in the first place. Br. 28-29. The Ninth Circuit's rule should be rejected, however, not because its violation would result in suppression. Rather, it should be rejected because it orders suppression without a violation of the text of the Particularity Clause on which it is based and cannot be defended on the policy ground that it would impose "no significant burden on law enforcement." Br. 28. The prospect that evidence would be suppressed, charges might have to be dismissed, and civil liability might ensue whenever the government inadvertently failed to do what respondent's rule requires *is* a significant burden on law enforcement.

C. The Remedy Of Suppression Cannot Be Justified When An Anticipatory Warrant Is Properly Executed After The Triggering Condition Is Satisfied

Even if an anticipatory warrant that does not specify the triggering condition can be considered overbroad as to time (because, on its face, it authorizes a search before the triggering event has occurred), such a warrant is not facially invalid. See U.S. Br. 29-34. The deficiency, if any, would be in the warrant's facial authorization of a search broader than the probable cause that supports its issuance. In such a case, the remedy would be to invalidate the unjustified portion of the warrant—*i.e.*, that which authorizes a search before the triggering event. No suppression would be required, however, as long as the search occurred *after* the triggering event (as is the case here).[8]

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[8] The warrant in this case did, in fact, incorporate the triggering condition. See Pet. App. 47a (search warrant referring to "the attached Affidavit"); *id.* at 37a (finding by the district court that "[t]he warrant incorporated the affidavit by reference" and that the warrant and incorporated affidavit were "in the immediate possession of the officers while they searched [respondent's] residence"). The Ninth Circuit's finding of a constitutional violation stemmed from its view that the Particularity Clause additionally mandated "officers to present any curative document * * * to the persons whose property is to be subjected to the search." *Id.* at 15a. The agents' failure to show the affidavit to respondent thus converted the search, in the court's eyes, into "a warrantless" one. *Id.* at 17a. The warrant, however, particularized the place to be searched and the things to be seized, was executed based on probable cause and in accordance with the magistrate's probable cause determination, and was shown to respondent. See U.S. Br. 24 n.11; Pet. App. 32a. The most that could be said, then, is that the agents conducted a search under a warrant that, while meeting all of the requirements of the Fourth Amendment, had been rendered technically overbroad as to time of execution by their own actions (*i.e.*, failing to leave the affidavit containing the triggering condition with the persons

Respondent acknowledges that the appropriate remedy when a search is "found to exceed the scope of the probable cause determination" is to "sever[] [the] parts of the warrant that are invalid." Br. 31. He contends, however, that that is not the appropriate remedy in this case, because an anticipatory warrant that does not describe the triggering condition "fails to conform to the particularity requirement in toto"; it is therefore "invalid"; and "an *invalid* warrant can[not] be saved through severance." Br. 31-32. For all of the reasons stated above, and in the government's opening brief, the Ninth Circuit erred in holding that "the particularity requirement of the Fourth Amendment applies * * * to the conditions precedent to an anticipatory search warrant." Pet. App. 13a. An anticipatory warrant that does not describe the triggering event, therefore, is *not* invalid, and it *can* be severed (assuming such a warrant is defective at all). Accordingly, if agents execute and serve an anticipatory warrant that on its face authorizes a search from the date of the warrant's issuance until ten days thereafter and fails to contain or incorporate the triggering condition, suppression is not required as long as the search occurred within the ten-day period and *after* the triggering event.

* * * * *

For the foregoing reasons, as well as those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JANUARY 2006

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whose property had been searched).

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In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JEFFREY GRUBBS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Whether the Fourth Amendment requires suppression of evidence when officers conduct a search under an anticipatory warrant *after* the warrant's triggering condition is satisfied, but the triggering condition is not set forth either in the warrant itself or in an affidavit that is both incorporated into the warrant and shown to the person whose property is being searched.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The NAFD is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender offices.

One of the guiding principles of the Association is to promote the fair administration of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. The Association has appeared as *amicus curiae* in litigation before the Supreme Court and the federal courts of appeals.[2]

The pending case raises important issues regarding the application of the Fourth Amendment in light of current technology and law enforcement practices. As *amicus curiae*, the Association offers its practical view of the federal criminal justice system, seen through the eyes

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

[2] Published decisions in which the Association has appeared as *amicus curiae* include: *Newland v. Saffold*, 534 U.S. 971 (2001); *Carey v. Saffold*, 536 U.S. 214 (2002); *Pacheco-Camacho v. Hood*, 535 U.S. 1105 (2002) (mem.); *United States v. Vonn*, 535 U.S. 55 (2002); *United States v. Arvizu*, 534 U.S. 266 (2002); *Overton v. Bazzetta*, 539 U.S. 126 (2003); *Massaro v. United States*, 538 U.S. 500 (2003); *In re Olabode*, 325 F.3d 166 (3d Cir. 2003); *Kowalski v. Tesmer*, 543 U.S. 125 (2004); and *United States v. Booker*, 543 U.S. 220 (2005).

of counsel who represent a majority of those charged with federal crimes in districts throughout every federal circuit.

SUMMARY OF ARGUMENT

The Fourth Amendment mandates that search warrants must be issued by a neutral and detached magistrate and must state with particularity the place to be searched. U.S. Const. amend IV. Anticipatory warrants are search warrants which do not become effective until after a specific "triggering event" occurs (usually the delivery of known contraband to a specific location). Because anticipatory warrants attempt to predict the future, they cannot be sufficiently particular in describing the triggering event. Such warrants frustrate the particularity and neutrality sought by the Framers of the Constitution: they replace the careful analysis of a neutral magistrate with an exercise of discretion by a law enforcement officer. While allowing officers to exercise this degree of discretion might have been necessary at a time where warrants could not be secured away from the courthouse, technological advancements now enable law enforcement officers to obtain a traditional warrant telephonically even when time is of the essence. Telephonic warrants, permitted under the Federal Rules and in at least twenty different states, allow neutral and detached magistrates to issue particularized search warrants. Using basic technology that is currently available (and widely used) by law enforcement officers, telephonic search warrants further legitimate law enforcement goals to the same extent as anticipatory warrants – but unlike anticipatory warrants, telephonic warrants ensure the protection of Fourth

Amendment rights. Given this readily available alternative, anticipatory warrants are unreasonable and should be barred by the Fourth Amendment.

Even if the Court finds that anticipatory warrants are not *per se* unconstitutional, the lack of particularity and amount of officer discretion inherent in these warrants should lead the Court to set a higher standard for anticipatory warrants than for traditional or telephonic warrants. Specifically, the Court should require law enforcement officers seeking an anticipatory warrant to show that special facts exist which demonstrate that a telephonic warrant would not be feasible in their specific case: for example, that there is reason to believe the contraband in question will be destroyed or disseminated to others immediately after receipt, before a telephonic warrant can be obtained. In the present case, there were no special facts since there was no evidence that Respondent had any intent or ability to disseminate the contraband once he received it, and there was ample time for the law enforcement officers to obtain a telephonic warrant after the controlled delivery was made. Accordingly, even if anticipatory warrants are not *per se* unconstitutional, the use of an anticipatory warrant was improper here.

ARGUMENT

I. INTRODUCTION

This is the first case in which this Court will consider the validity and scope of anticipatory search warrants – warrants which premise probable cause on predictions about possible future events rather than solely on observed and known facts. The question presented asks

whether an anticipatory warrant must specify the future triggering event on its face or in an attached affidavit that is shown to the person whose home is to be searched. *Amicus* agrees with the Ninth Circuit that, if anticipatory warrants are to be used, the warrant or attached affidavit must describe this event. *Amicus* submits, however, that the Court's initial consideration of anticipatory warrants must necessarily venture beyond the narrow confines of the question presented to include a broader inquiry into the justification for these warrants and standards used to govern them. Any such inquiry must consider the technological advancements that have revolutionized law enforcement practice since anticipatory warrants first came into use.

Technology plays a central role in the way that officers detect, investigate, and apprehend criminals. With the proper judicial authorization, law enforcement officers are permitted to eavesdrop on private telephone conversations,[3] install cameras in private offices,[4] and intercept private electronic mail correspondence.[5] The effect has been even more dramatic for investigatory methods which do not require prior judicial approval: law enforcement officers use airplanes to view the exposed areas of a person's home and property;[6] videotape faces in a public area and compare them to known fugitives using facial

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[3] *See* Title III of the Omnibus Crime and Control Act of 1968, 18 U.S.C. § 2518 et seq.; *United States v. Cox*, 462 F.2d 1293, 1302-04 (8th Cir. 1972).

[4] *United States v. Koyomejian*, 970 F.2d 536, 542 (9th Cir. 1992).

[5] *See* Electronic Communication and Privacy Act, 18 U.S.C. §§ 2510-2521 (1986).

[6] *California v. Ciraolo*, 476 U.S. 207, 215 (1986).

recognition technology;[7] trace the incoming and outgoing numbers dialed from a telephone;[8] and maintain a sophisticated computer database of DNA records which have been collected from convicted felons.[9]

In short, new technologies are increasingly being used to assist law enforcement in hundreds of different ways. But these technologies can also help protect individual privacy during the investigative process. Law enforcement officers in the field can now instantaneously communicate with magistrates using commonplace technology, such as cellular phones and laptop computers. These widely available tools have the potential to minimize abuses by law enforcement officers when conducting searches of individuals' homes by allowing the officers to communicate with a magistrate in real time in order to obtain a search warrant based on events the officers have personally witnessed.

When law enforcement officers first began to use anticipatory warrants, such instant communication was rarely feasible. Lacking immediate access to the officer in the field, the magistrate would issue an anticipatory warrant, which was conditioned upon the possible occurrence of a future event. By definition, these warrants lack a certain level of particularity, since the future event could never be predicted with precision. Since the only other options available for law enforcement were either to

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[7] Christopher S. Milligan, Note, *Facial Recognition Technology, Video Surveillance, and Privacy* 9 S. Cal. Inderdis. L.J. 295, 318-19 (1999)

[8] *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979).

[9] *See* DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. § 14135 et seq.; *United States v. Sczubelek*, 402 F.3d 175 (3rd Cir. 2005).

conduct a warrantless search or find a pay phone and attempt to reach a magistrate, lower courts were willing to permit anticipatory search warrants.

Today these options have changed dramatically. Commonly available technologies have given law enforcement the ability to use telephonic warrants in a way which protects the Fourth Amendment rights of citizens but does not detract from the critical goals of law enforcement activities. In light of these changed circumstances, the Court should find that anticipatory warrants are unconstitutional or, at a minimum, require that an anticipatory warrant may only issue when law enforcement officers can show that a telephonic warrant is not feasible.

II. ANTICIPATORY WARRANTS ARE NOT REASONABLE IN LIGHT OF THE READY AVAILABILITY OF TELEPHONIC WARRANTS

A. Because They Rely On Officer Discretion, Anticipatory Search Warrants Do Not Satisfy The Particularity Requirement Of The Fourth Amendment

An anticipatory search warrant differs from a traditional search warrant in that it is issued by a magistrate *before* the evidence or contraband reaches the place to be searched. *See* 2 Wayne R. LaFave, *Search and Seizure* 3.7(c) (4th ed. 2004). The officer applying for the warrant does not demonstrate at the time of the application that probable cause exists, but rather attempts to predict that there will be probable cause at some future time. 2 LaFave at 3.7(c). These warrants are most commonly issued in cases where police officers have reason to believe that a package containing contraband will be delivered by mail to

a specific address. *Id.* (citing *United States v. Santa*, 236 F.3d 662 (11th Cir. 2000) (major drug transaction, where federal agents knew several hours earlier time and location of event); *United States v. Garcia*, 882 F.2d 699 (2d Cir. 1989) (drug couriers intercepted at border agreed to complete delivery to specified residence).

The typical case involves an international package that arouses the suspicion of customs agents, who inspect and find drugs. The agents notify federal or local law enforcement authorities and relay the anticipated delivery time and location. Law enforcement officers create a plan to monitor or control the delivery. Before the delivery, however, officers seek to obtain an anticipatory warrant so that they may execute a search immediately after the package has been delivered. For example, in *United States v. Lowe*, 575 F.2d 1193 (6th Cir. 1978), the Detroit Post Office made a "controlled delivery" of a package to the defendant's home after the international package was opened by customs officials at the post office as a part of a routine drug inspection of packages originating in Thailand, a known source of heroin. *Id.* at 1193. Law enforcement officials obtained an anticipatory warrant authorizing a search of the defendant's home and seizure of the heroin after the delivery was completed. *Id.* The package was then resealed and delivered by the post office. *Id. See also United States v. Jackson*, 55 F.3d 1219 (6th Cir. 1995) (DEA agents secured an anticipatory search warrant before the controlled delivery of a Nigerian package containing eighty grams of heroin to a Cleveland address).

In seeking an anticipatory warrant, a law enforcement officer submits the application and affidavit to a magistrate, who determines whether probable cause is likely to exist if the so-called triggering event takes place. If the

magistrate finds that probable cause is likely to exist at that future time, he will authorize a conditional search through an anticipatory warrant. The warrant will provide that it cannot be executed until the triggering event occurs – typically the delivery of the contraband to a specified address. Ideally, an anticipatory warrant narrowly describes the triggering event, the event occurs exactly as it was described, and the officer carries out the search precisely as it was authorized by the magistrate. Unfortunately, this ideal scenario is difficult to achieve, since an anticipatory warrant essentially attempts to predict what will happen in the future, and the future is inherently uncertain.

This uncertainty leads to one of two fatal defects for anticipatory warrants: either the triggering event does not occur as described, in which case the ultimate decision as to whether probable cause exists is made not by a neutral magistrate but instead by a law enforcement officer; or the triggering event is described so broadly that the warrant lacks the necessary particularity under the Fourth Amendment.

The first possibility is that the triggering event is described with sufficient particularity, but does not occur exactly as was predicted in the warrant. For example, in *United States v. Miggins*, 302 F.3d 384 (6th Cir. 2002), police officers secured an anticipatory search warrant before a controlled delivery of a package containing cocaine to the defendant's home. *Id.* at 387. The affidavit appended to the search warrant provided the following triggering event: "When [the package containing the cocaine] is delivered to this address and possession of the package is taken by someone inside 2335 Cooper Terrace, as is anticipated, then and only then will the search

warrant be executed." *Id.* at 394. However, when the controlled delivery actually occurred, one of the three co-defendants signed for the package outside of the residence and all three immediately left the premises, taking the package with them. *Id.* Even though the triggering event had not occurred, and even though there was no reason to believe that the contraband was inside the home (since the package had never been taken inside the home), the officers executed the search warrant and searched the home, finding an illegal firearm. *Id.* The defendants argued that the search of the home was invalid because the triggering event did not occur. In upholding the warrant, the *Miggins* court effectively broadened the plain language of the triggering event after the fact, opining that a "common sense reading" of the triggering event would encompass not just receipt by someone inside the defendant's residence, but also receipt by someone "who had been inside the premises just prior to the delivery of the package." *Id.* at 396. Although the *Miggins* court claims this was "common sense," the conclusion is certainly debatable: would the magistrate have found probable cause to search the home if in fact he knew that the contraband never went inside the home? The language of the triggering event implied just the opposite: the reason the magistrate believed there would be probable cause to search the home was that known contraband had just been taken inside the home. But whether the magistrate would have issued a warrant or not had the true facts been known is actually beside the point; the real problem is that the magistrate never got the chance to make the decision. Instead, the law enforcement officers made the final determination as to whether probable cause existed at the time of the search.

In attempting to avoid the problem of an unfulfilled triggering event, law enforcement officers frequently produce an anticipatory warrant with the second type of constitutional flaw: describing the triggering event in such broad terms that many possible outcomes will fulfill it. In *United States v. Ricciardelli*, 998 F.2d 8 (1st Cir. 1993), for example, the court found that an anticipatory warrant was invalid because its triggering event was too broad. *Id.* at 19-20. The warrant stated that it would not authorize a search of the defendant's home "until after delivery by mail to and receipt by [the defendant] of the . . . package containing the videotape." *Id.* at 14. The defendant was not home when the videotape was delivered, however, and he ultimately picked the package up at the local post office. *Id.* at 9-10. Because the warrant did not specify that the delivery had to take place at the defendant's home, the law enforcement officers concluded that the triggering event had been satisfied when the defendant picked up the videotape up at the post office, and they executed the warrant and searched the defendant's home. *Id.* at 10. The circuit court concluded that the officers had abused their discretion, and that "[a]n anticipatory search warrant that cedes such great discretion to the executing agents cannot withstand constitutional scrutiny." *Id.* at 12.

In short, because anticipatory warrants rely on the ability of police officers and magistrates to predict the future, they run the risk of, on the one hand, being so narrowly drawn that the triggering event is described incorrectly, thus requiring the law enforcement officer to decide if the actual triggering event that unfolds is close enough to the one approved by the neutral magistrate, or on the other hand, describing the triggering event in overly

broad terms, thus lacking the necessary level of particularity. Either way, these warrants put too much discretion into the judgment of the law enforcement officer. As the Ninth Circuit has stated:

> [A] warrant conditioned on a future event presents a potential for abuse above and beyond that which exists in more traditional settings: inevitably, the executing agents are called upon to determine when and whether the triggering event specified in the warrant has actually occurred.

United States v. Hotal, 143 F.3d 1223, 1226 (9th Cir. 1998) (quoting *Ricciardelli*, 998 F.2d at 12). Furthermore, a broad description of the triggering event can also impact innocent third parties, who may (as in the current case) accept delivery of the contraband instead of the defendant. *See* R. at 241.

This Court has held that the particularity requirement prevents general searches carried out according to police officer discretion, and "ensure[s] that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). Anticipatory warrants open the door to overbroad police discretion. They inappropriately delegate to police officers the judicial responsibility of determining probable cause, since the law enforcement officer, not the magistrate, decides when the triggering event occurs. The Fourth Amendment does not permit law enforcement officers to determine the validity of their own invasive actions. Instead, a neutral detached magistrate is meant to act as a shield between law enforcement officers conducting a search and an individual citizen. This Court

has explained that an independent, objective mind is necessary to weigh the invasion of privacy against the need to enforce the law.

> The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.

McDonald v. United States, 335 U.S. 451, 455-56 (1948). A warrant issued by a neutral and detached magistrate is necessary to protect individuals from improper searches; this role cannot be entrusted to police officers with law enforcement objectives. *Lo-Ji Sales v. New York*, 442 U.S. 319, 362 (1979). There is too much room for abuse when the officer, whose goal it is to find evidence of a crime, is asked to decide whether the prediction of an anticipatory warrant has proved to be sufficiently accurate to authorize the search.

B. Telephonic Procedures Allow Neutral Detached Magistrates To Issue Particularized Search Warrants

Despite their obvious danger, anticipatory warrants have long been deemed necessary by the lower courts. They were first evaluated by judges over thirty-five years ago, and courts in the early cases stated their concern that if anticipatory warrants were not permitted, the contraband might be destroyed or be taken off the premises before a traditional warrant could be obtained. *See, e.g., United States ex rel. Beal v. Skaff*, 418 F.2d 430, 432-34

(7th Cir. 1969) ("The nature of the article to be seized – the very real possibility that delay might have resulted in its disposal or concealment – compelled quick action by the magistrate"). Given the warrant procedures and technology available at the time, it was nearly impossible for an officer to communicate with a magistrate and procure a warrant while on the scene of a potential search. Anticipatory warrants provided courts with an alternative that allowed for some judicial control of the investigative process. Courts were willing to allow officers to apply for anticipatory warrants and exercise their discretion in executing these warrants, since the only other realistic option was to force the officer to make a warrantless search and plead exigent circumstances after the fact. *See Alvidres v. Superior Court*, 12 Cal. App. 3d 575, 581 (Cal. Ct. App. 1970) (explaining that where obtaining a traditional warrant is too time consuming, the court favors the use of anticipatory search warrants over officer reliance on exigent circumstances; no other warrant option was contemplated); *People v. Glen*, 30 N.Y.2d 252, 257 (N.Y. 1972) (noting that police face the dilemma of choosing between obtaining a search warrant in advance of a delivery, or conducting a search without a warrant).

Two significant changes have occurred since appellate courts first approved anticipatory search warrants. First, procedures for telephonic search warrants were developed and authorized by federal courts and also codified in many state procedural rules. *See* Fed. R. Crim. P. 41(d)(3) (2005) (amending Fed. R. Crim P. 41(c)(2) (1977)); Cal. Penal Code §§ 1526(b), 1528(b) (1970) (codifying the first telephonic search warrant procedure). Second, and more critically, new technologies have been developed which allow for instant verbal and written long-distance communication,

making the use of telephonic search warrants simple and practical.

Today, the Federal Rules of Criminal Procedure and procedures in at least twenty states authorize the use of telephonic search warrants.[10] It has been strongly recommended that "every State enact legislation that provides for the issuance of search warrants pursuant to telephoned petitions and affidavits from police officers." Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Report on Police 95 (1973).

Under Federal Rule of Criminal Procedure 41(d)(3), officers and agents are permitted to obtain search warrants from magistrates by communicating over the telephone or through facsimile transmission. This process involves several steps. First, the officer must prepare a proposed duplicate original warrant. Fed. R. Crim. P. 41 (e)(3)(A). Once an officer believes that he has probable cause to conduct the search, he then must communicate with the magistrate by phone or fax. *Id.* at (d)(3)(A). The magistrate must then place the applicant and any person on whose testimony the application is based under oath and make a verbatim record of the communication. *Id.* at

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[10] Lafave *supra*, at 4.3(c); Fed. R. Crim. P. 41(d)(3); Ala. R. Crim. P. 3.8(b); Alaska Stat. §§ 12.35.010-.015; Ariz. Rev. Stat. §§ 13-3914(C), 13-3915(C); West's Ann. Cal. Penal Code §§ 1526(b), 1528(b); Idaho Code § 19-4404; Ind. Code § 35-33-5-8; Iowa Code §§ 321J.10, 462A.14D (limited to specific circumstances); Kan. Stat. Ann. § 22-2502; La. Code Crim. Proc. art. 162.1; Mich. Comp. Laws Ann. § 780.651; Minn. R. Crim. P. 36.08; Mont. Code Ann. § 46-5-221; Neb. Rev. Stat. §§ 29-814.03-.05; Nev. Rev. Stat. § 179.045; N.J. Rules of Ct. 3:5-3; N.Y. Crim. P.L. §§ 690.35-.36; N.C. Gen. Stat. Ann. §§ 15A-244, -245; N.D.R. Crim. P. 41(c)(2); Or. Rev. Stat. § 133.545(5); Utah Code Ann. § 77-23-204(2); Wash. Sup. Ct. Crim. R. 2.3(c); Wis. Stat. § 968.12(3).

(d)(3)(B). The officer must then communicate the contents of the proposed duplicate to the magistrate and the magistrate must enter the contents of the proposed duplicate original warrant into an original warrant. *Id.* at (e)(3)(A) and (e)(3)(B). Any modifications discussed by the officer and the magistrate must be reflected on both the original and the duplicate. *Id.* at (e)(3)(C). If the magistrate decides that the telephonic warrant is supported by probable cause, he must immediately sign the original warrant and direct the applicant to sign the magistrate's name on the duplicate warrant. *Id.* at (e)(3)(D). Because telephonic warrant procedures such as these allow for intervention by a neutral judicial officer, they "minimize the necessity of federal law enforcement officers engaging in other practices which, at least on occasion, might threaten to a greater extent those values protected by the Fourth Amendment." Fed. R. Crim. P. 41(d)(3), Notes of Advisory Committee on Rules, 1977 Amendment (referring to former Rule 41(c)(2)).

Despite their constitutional benefits, the procedures for obtaining telephonic warrants were quite cumbersome and time-consuming when they were first introduced. In the early 1970s, acquiring a telephonic warrant could take up to two hours. Justin H. Smith, Note, *Press One for Warrant: Reinventing the Fourth Amendment's Search Warrant Requirement Through Electronic Procedures*, 55 Vand. L. Rev. 1591, 1625 n.237 (2002) (noting that in 1973, 65% of the city's telephonic search warrants were obtained in one hour or less and 35% were obtained in one to two hours). Even fifteen years after telephonic warrants were first authorized, police had to rely on local pay phones to communicate with magistrates. *See California v. Carney*, 471 U.S. 386, 404 n.16 (1985) (Stevens, J., dissenting) ("a

telephonic warrant was only 20 cents and the nearest phone booth away").

But much has changed in the past twenty years. Advances in technology now allow law enforcement officers to engage in instantaneous communication with magistrates. Law enforcement officials can use cellular telephones, portable fax machines, laptop computers, and a wide array of similar technology to communicate with a magistrate by voice, fax, or e-mail in a matter of minutes, not hours. For example, the micom3T HF radio transceiver provides reliable method for long-range wireless communications of voice, fax, email, and data.[11] Similarly, Santa Monica police cars are equipped with Motorola Spectra radios that allow officers to speak with their own department and most of the other agencies located in Southern California.[12] In Roseville, California, Pentium 3 computer hard drives are mounted in the trunks of the cars. "From the driver's seat, officers can write reports and receive dispatched information, such as suspect photos and maps, using the computer's wireless capability."[13]

Nationwide, a majority of sheriffs' offices in large jurisdictions use in-field computers or terminals, and the number is growing rapidly. In 1990, only 14% of mid-sized sheriffs' offices (those serving a population of between

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[11] http://www.motorola.com/governmentandenterprise/northamerica/en-us/public/functions/browseproduct/productdetailpage.aspx?navigationpath=id_803i/id_1387i/id_2353i/id_1575i.

[12] http://santamonicapd.org/Information/interior.htm.

[13] http://www.policeone.com/police-technology/articles/96243/; *see also* http://www.hoffmanestates.com/ police/Insideshow.shtml (displaying the inside of local Illinois police cruisers, fully equipped with video cameras, radars, laptop computers, radios, and cell phones).

100,000 and 500,000) used such technology; by the year 2000, 61% of such offices did. In the larger jurisdictions (those with a population of over 500,000), 63% of sheriffs' offices utilize this technology. Bureau of Justice Statistics, Law Enforcement Management and Administrative Statistics, *Sherriffs' Offices 2000*, at 25 (2003). The numbers for local police departments are even more dramatic: for jurisdictions of 250,000 or greater, 56% utilized in-field computers or terminals in 1990, increasing to 89% in the year 2000. Bureau of Justice Statistics, Law Enforcement Management and Administrative Statistics, *Sherriffs' Offices 2000*, at 25 (2003).

These advances in technology and their widespread adoption by law enforcement agencies have considerably shortened the length of time required to acquire a telephonic warrant from a magistrate. They make it possible for law enforcement officers to conduct valid searches pursuant to particularized warrants even when time is of the essence. Together, technological advances and telephonic warrant procedures render anticipatory warrants all but obsolete.

The most time-consuming aspect of the telephonic warrant application is the preparation of a duplicate warrant. The time required to prepare a duplicate warrant has led some courts to disfavor telephonic warrants because doing so is not a "simple procedure." *See, e.g., United States v. Manfredi*, 722 F.2d 519, 523 (9th Cir. 1983) ("A telephonic warrant may not be obtained simply by calling a magistrate. Among other things, a 'duplicate original warrant' must be prepared in writing and read to the magistrate verbatim.") However, this concern is not present in any of the scenarios for which an anticipatory warrant might be issued. If the officers have time to draft

an anticipatory warrant and submit it to a magistrate before the contraband is delivered, the officers clearly have time to prepare a duplicate warrant in advance and have it ready for submission to a magistrate. Then, instead of predicting (and using their own discretion to interpret) a triggering event, the law enforcement officers simply call the magistrate once they believe the probable cause has actually developed, and the magistrate decides whether the warrant should issue. Thus, in the situations in which an anticipatory warrant might be used, the amount of time it takes to procure a telephonic warrant from the scene of the delivery is no more than the amount of time required to communicate with the magistrate – which, given today's technology, is minimal. In short, telephonic procedures allow neutral and detached magistrates to issue particularized search warrants in essentially the same amount of time as anticipatory warrants.

C. Because Telephonic Search Warrants Maximize the Protection of Fourth Amendment Rights With No Appreciable Cost To Law Enforcement Goals, Anticipatory Warrants Are Unconstitutional

The Fourth Amendment protects against unreasonable searches and requires warrants to be issued only upon probable cause stating with particularity the place to be searched. U.S. Const. amend. IV. Furthermore, warrants must be issued by a neutral and detached magistrate. *Lo-Ji Sales v. New York*, 442 U.S. 319, 362 (1979). Like traditional written warrants, telephonic warrants satisfy the particularity and neutrality requirements of the Fourth Amendment because they are issued after the event giving rise to probable cause occurs. By contrast,

anticipatory warrants, in attempting to predict future events, fail to provide the necessary particularity, and effectively move the power to authorize a warrant from the neutral magistrate to the officer in the field.

For example, consider the typical situation where anticipatory warrants are sought: law enforcement officials are alerted to a package containing drugs by postal agents being sent to a certain location. The officers set up a controlled delivery and establish surveillance outside of the location. If operating under an anticipatory warrant, the officers would wait for the triggering event (the delivery of the package) to occur. If the triggering event does not take place as laid out in the anticipatory warrant (e.g., the defendant's sister accepts the package rather than the defendant) the decision whether to execute the search is left in the hands of the officer.

Telephonic warrants provide for particularity in this scenario. Regardless of whether the delivery unfolded as the officer anticipated, the officer would communicate the actual events to a magistrate via telephone or fax. The magistrate, and not the officer, would then make the probable cause determination. Thus, there is no conditional triggering event, only the actual event, and the neutral magistrate determines whether this event gives rise to probable cause. "A warrant authorized by a neutral and detached judicial officer is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of fettering out crime." *Lo-Ji Sales*, 442 U.S. at 362 (1979) (internal citations omitted).

Not only do telephonic warrants protect Fourth Amendment rights, they also serve as a valuable law

enforcement tool. Because telephonic warrants do not suffer from the same constitutional inadequacies as anticipatory warrants, evidence obtained under their authority will be protected from challenge by the defendant. *See, e.g., United States v. Hendricks*, 743 F.2d 653, 655 n.2 (9th Cir. 1984) (anticipatory search warrant was invalid because there was not sufficient nexus between the contraband and the house named in the warrant; once the contraband was in the place to be searched, the agents "could have so informed the magistrate so that the magistrate and not the agent could make the determination of probable cause"); *United States v. Ricciardelli*, 998 F.2d 8, 14 (1st Cir. 1993) (anticipatory warrant authorizing search of defendant's home not valid when search of defendant's home was triggered by defendant's personal receipt of contraband at post office because there was no nexus between triggering event and place to be searched); *United States v. Loy*, 191 F.3d 360, 364-67 (3d Cir. 1999) (anticipatory warrant to search suspect's home not valid because there was no showing that he would bring contraband home from post office box); *United States v. Hotal*, 143 F.3d 1223, 1226-27 (9th Cir. 1998) (anticipatory warrant not valid because it did not specify conditions precedent to execution); *United States v. Rowland*, 145 F.3d 1194, 1201 (10th Cir. 1998) (anticipatory warrant not valid because magistrate did not have sufficient information to believe contraband would be at suspect's residence at the time of the search); *United States v. Nixon*, 918 F.2d 895, 903 n.6 (11th Cir. 1990) (anticipatory warrant to search automobile would not have been valid because officers were not sure what type of car suspect would be driving or whether suspect would make the trip); *United States v. Flippen*, 674 F. Supp. 536, 539-40 (E.D. Va. 1987) (court finds that anticipatory warrants are not justified for pornography

cases because ample time exists to obtain a traditional or telephonic warrant). Finally, it should be noted that barring anticipatory warrants will not create any extra burden on the court system: procedures already exist in many jurisdictions for telephonic warrants, and telephonic warrants do not require any more financial resources or time commitment than anticipatory warrants.

The present case exemplifies the preferability of telephonic warrants over anticipatory warrants. Grubbs's arrest was the result of a four-month investigation by the United States Postal Service into his internet purchase of a single video tape containing sexually explicit material involving a minor. R. at 0034. Prior to the arrest, the federal agents obtained an anticipatory warrant to search Grubbs's residence. The affidavit submitted with the warrant application provided that the warrant would not be executed "unless and until the [video] has been received by a person(s) and has been physically taken into the [Respondent's] residence." R. at 0020-21.

At 7:20 A.M. on the morning of the Respondent's arrest, an undercover postal inspector delivered the videotape to the Respondent's home. R. at 0241. Shortly after the delivery, the Respondent left his home and walked to his car. R. at 0034. The tape was not in his possession and there was no evidence that he ever saw the tape or knew of its delivery. *Id*. There was no evidence that the contraband would be destroyed or disseminated to others. Thus, the officers had sufficient time to secure the premises and obtain a telephonic warrant, thereby allowing a magistrate to make the critical decision as to whether probable cause existed and issue a warrant with the required level of particularity.

Some argue that without anticipatory warrants, law enforcement officers will eschew telephonic warrants in favor of warrantless searches under the guise of the exigent circumstances exception to the warrant requirement. *See, e.g.*, Andrew M. Belt, Comment, *Anticipatory Search Warrants: State and Federal Applications and Their Future in Maryland*, 28 U. Balt. L. Rev. 337, 375 (1999). Properly interpreted, the exigent circumstances exception would not allow such abuse, at least not in those circumstances when an anticipatory warrant would be considered. A search is valid under the exigent circumstances exception only when there is probable cause to support a search or seizure and either: (1) the evidence sought is in imminent danger of destruction, *Cupp v. Murphy*, 412 U.S. 291, 294-96 (1973); (2) the safety of police officers or the public is in danger, *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967); (3) the police are in "hot pursuit" of a suspect, *United States v. Santana*, 427 U.S. 38, 42-43 (1976); or (4) to prevent the suspect's escape, *Minnesota v. Olson*, 495 U.S. 91, 100 (1990). *See generally* Jeffrey Haningan Kuras, et al., *Thirty-First Annual Review of Criminal Procedure: I. Investigation and Police Practices: Warrantless Searches and Seizures*, 90 Geo. L.J. 1130, 1157 (2002). The only possible justification that could apply in the context of a controlled or monitored delivery of contraband to a known location is the risk of imminent destruction of evidence, and even that that risk does not exist in the vast majority of cases in which an anticipatory search warrant is used. In order to justify such a warrantless search, the officers would have to convince a court that the suspect was aware of the officers' surveillance and was therefore likely to destroy the evidence as soon as it arrived. *See, e.g., United States v. Tovar-Rico*, 61 F.3d 1529, 1535 (11th Cir. 1995) (police

believe that others inside the residence would destroy evidence was not reasonable because those inside were unaware of police activity); *United States v. Torres*, 705 F.2d 1287, 1297 (11th Cir. 1983) ("There is no evidence that [the Defendants] were aware of the officers' surveillance; thus [the Defendants] had no reason to destroy the contraband or to flee the premises. Without an imminent risk of destruction of the evidence, the agents had no right to enter the house without a search warrant").

Officers should be required to obtain a traditional warrant in every situation – by telephonic or written means *after* the event giving rise to probable cause occurs – unless exigent circumstances exist (i.e., they reasonably believe there is a danger of imminent destruction of evidence). Relying on anticipatory warrants is unreasonable when it is equally feasible to obtain warrants that fully comply with the Fourth Amendment. Through telephonic warrants, law enforcement officers can protect the suspect's Fourth Amendment rights and still conduct their investigation effectively.

III. EVEN IF THE COURT FINDS ANTICIPATORY WARRANTS TO BE REASONABLE, THESE WARRANTS SHOULD ONLY BE USED WHEN OFFICERS ARTICULATE SPECIAL FACTS JUSTIFYING THEIR INABILITY TO OBTAIN A TELEPHONIC WARRANT AFTER THE OCCURRENCE OF THE EVENT GIVING RISE TO PROBABLE CAUSE

Even if this Court finds that anticipatory warrants do not violate the Fourth Amendment, it should acknowledge that these warrants increase the discretion exercised by

law enforcement officials and thereby represent an unusually severe intrusion upon individual rights. Because of this increased intrusion, the Court should limit the use of these warrants to situations in which the law enforcement shows a specific need to rely upon them. Anticipatory warrants should be prohibited unless law enforcement officials can set forth objective reasons why a telephonic warrant would not be feasible under the circumstances. In other words, anticipatory warrants should only be permitted in cases in which special facts exist – when officers can present objective evidence at the time of the warrant application that the contraband is likely to be immediately destroyed or disseminated upon delivery.

This proposed test for anticipatory warrants would differ from the test for warrantless searches on exigent circumstances. The exigent circumstances exception requires the law enforcement officer to demonstrate that *at the time of the search*, the evidence was in imminent danger of destruction, *Cupp*, 412 U.S. at 294-96, or the search was necessary to prevent the suspect's escape, *Olson*, 495 U.S. at 100.[14] The test for an anticipatory warrant would require the law enforcement officer to establish *at the time of the warrant* that there was reasonable cause to believe that the contraband would be destroyed or (more likely) disseminated so quickly after delivery that there would not even be time to procure a telephonic warrant. Such a showing would include evidence as to how long it would take to obtain a telephonic

[14] As noted in Part I.C., *supra*, there are other potential justifications for a warrantless search pursuant to the exigent circumstances exception, but they are not applicable in the anticipatory search warrant context.

warrant under the conditions of the controlled delivery, as well as evidence that supports the contention that the suspect would likely destroy or disseminate the contraband during that brief time period.

For example, special facts justifying issuance of an anticipatory warrant might exist when officers conduct a controlled delivery of narcotics to a known dealer. Narcotics often impose obstacles to effective police detection – they tend to be used up or distributed quickly upon delivery and are easily disposed of when suspicion of police involvement arises. Similarly, if a digital file containing child pornography is delivered to a suspect over the internet, and law enforcement officials have reason to believe the suspect will immediately transmit or post the illegal images over the internet, officers may have reason to resort to the use of an anticipatory warrant in order to immediately secure the premises and seize the contraband.

This proposed standard would make it more difficult to obtain anticipatory warrants, but would still be easier to meet than the exigent circumstances test, which requires a belief that there is *imminent* danger of destruction. Thus, anticipatory search warrants would be placed in the appropriate spot along the spectrum of permissible searches under the Fourth Amendment: more intrusive (and thus requiring more justification) than traditional or telephonic warrants, but not as intrusive (and thus requiring a lesser justification) than a warrantless search under the exigent circumstances exception.

The proposed standard would also resolve a circuit split regarding the showing that must be made before anticipatory warrants issue. At present, there is no uniformity

among the federal courts as to when and how anticipatory warrants are issued. Magistrates in the First, Fourth, Sixth, Seventh, Ninth, and Tenth Circuits will issue an anticipatory warrant if the contraband is on a "sure course" to the place that will be searched. *See Ricciardelli*, 998 F.2d at 13 (1st Cir. 1993) (adopting the "sure and irreversible course" standard as a means of judging the validity of anticipatory warrants); *United States v. Goodwin*, 854 F.2d 33, 36 (4th Cir. 1988) (anticipatory search warrant valid where the package is on a "sure course to its destination, as in the mail"); *United States v. Lawson*, 999 F.2d 985, 988 (6th Cir. 1993) (approving the proposition that a search warrant may be based solely on the fact that a package containing illegal substances is on a "sure course" to a destination); *United States v. Brack*, 188 F.3d 748, 757 (7th Cir. 1999) (requiring contraband to be on a "sure course" for a valid anticipatory warrant because of potential for abuse); *United States v. Hale*, 784 F.2d 1465, 1468-69 (9th Cir. 1986) ("an affidavit in support of an anticipatory search warrant must show that the property sought is on a sure course to the destination targeted for the search").

On the other hand, magistrates in the Second, Third, Fifth, Tenth, and Eleventh Circuits discuss "sure course" only as one factor under the totality of the circumstances analysis for determining probable cause. *United States v. Garcia*, 882 F.2d 699, 702 (2nd Cir. 1989) (recognizing "sure course" as a factor in deciding whether an anticipatory is constitutional); *United States v. Loy*, 191 F.3d 360, 365 (3d Cir. 1999) (using "sure course" as a factor in determining the existence of probable cause); *United States v. Wylie*, 919 F.2d 969, 974-76 (5th Cir. 1990) (approving the issuance of an anticipatory warrant even after

the package had been delivered to the place to be searched); *United States v. Rowland*, 145 F.3d 1194, 1204 n.3 (10th Cir. 1998) (describing "sure course" as a "proxy for the actual presence of the contraband" at the place to be searched, but declining to decide whether "sure course" is a requirement for valid anticipatory warrants); *United States v. Santa*, 236 F.3d 662, 672 n.14 (11th Cir. 2000) (explaining that the court's previous "sure course" requirement in *United States v. Nixon*, 918 F.2d 895, 903 n.6 (11th Cir. 1990) was merely dictum and not controlling). This confusion should be replaced with a standard test that requires a showing of (1) probable cause at some narrowly defined point in the future and (2) special facts which demonstrate the inability to obtain a telephonic warrant at the point at which probable cause develops. Only a showing of these special facts justifies issuing a warrant that puts increased discretion into the hands of law enforcement officials.

Under this proposed test, the search in Grubbs's case was invalid. The special facts that often exist in narcotics deliveries or digital child pornography transmissions did not arise in the present case. The police monitored Grubbs over a four-month period as he communicated with an undercover agent about purchasing videos depicting minors engaged in sexually explicit conduct. R. at 0009-10. During this period, there was no suggestion that Grubbs was a dealer or distributor of pornographic videos. R. at 0017-18. Under the plan for the controlled delivery, seven postal inspectors and three patrol officers set up surveillance around the Grubbs's home in preparation of delivery. R. at 0241. The contraband consisted of a single videotape, and there was no evidence showing that the Respondent intended to deliver the tape to others, nor that he could

feasibly have done so in the short amount of time that would have been required to obtain a telephonic warrant while his house was under surveillance. Thus, special facts were non-existent in this case. At the time of the warrant application, the police officers had no reason to suspect that upon delivery the video would be destroyed or disseminated. In such circumstances, a telephonic warrant would have been reasonable, while an anticipatory warrant was not.

CONCLUSION

As this Court has noted before, "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *United States v. Kyllo*, 533 U.S. 27, 34-5 (2001). Law enforcement officers have at their disposal countless high-tech tools to assist them in their detection and investigation of crimes, such as DNA analysis, sophisticated computer databases containing personal information, and videocameras installed in public areas. These tools all enhance law enforcement officers' ability to catch criminals while at the same time changing the conception of what is considered private information. As new technologies are becoming more and more commonplace and increasingly being used to assist law enforcement in detecting crime more efficiently, courts should ensure that the same technologies are used – when possible – to protect individuals' rights. *See* John Henry Hingson III, *Telephonic and Electronic Search Warrants: A Fine Tonic for an Ailing Fourth Amendment – Part One*, 29 Champion 38, 39 (2005).

Grubbs's case is a perfect example of law enforcement officers' selective use of new technology. Federal agents used modern technology throughout the investigation in order to detect and apprehend Grubbs: they placed an advertisement for their video in internet chat rooms, sold the video to the Respondent over a website, corresponded with him at length over e-mail, and utilized a public access information search system to gather information about him in order to plan the controlled delivery. R. at 0009-17. Yet when the time came to exercise the warrant, the police failed to use the most basic technology in order to ensure that the Respondent's Fourth Amendment rights would be protected.

Respectfully submitted,

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UNITED STATES OF AMERICA,

Petitioner,

v.

JEFFREY GRUBBS,

Respondent.

On Writ of Certiorari
to the Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND PROFESSOR GEORGE C. THOMAS III IN SUPPORT OF RESPONDENT

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BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND PROFESSOR GEORGE C. THOMAS III IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL"), a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes, foster the integrity, independence and expertise of the criminal defense profession, and promote the proper and fair administration of justice.[1] NACDL has 10,000 members nationwide–joined by 80 state and local affiliate organizations with 28,000 members–including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. Professor Thomas is the Judge Alexander P. Waugh, Sr. Distinguished Scholar at Rutgers University School of Law. Professor Thomas has published numerous books and articles dealing with constitutional and criminal law and legal history. The NACDL and Professor Thomas are concerned because the issues presented in this case relate to a widely-used type

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1. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than NACDL, made any monetary contribution to its preparation or submission. *See* Rule 37.6, Sup. Ct. Rules. Letters of consent from the parties have been lodged with the Clerk of the Court. Rule 37.3(a).

of search warrant, the constitutionality of which[2] may be properly assessed only pursuant to an adequate examination of the historical background of the Fourth Amendment.

SUMMARY OF ARGUMENT

The Anglo-American revulsion toward the sort of broad governmental search-and-seizure authorizations that were still commonplace in the first half of the eighteenth century had many objects, and went through many phases. English search-and-seizure practices in the preceding centuries were commonly quite violent, and were used as weapons for stifling dissent, forestalling rebellion, and intimidating political opponents. But as the Revolution neared in America, and the colonists rapidly underwent a sea change in their attitude toward broad general warrants and writs of assistance, one theme became increasingly central: the conviction that non-particularized search-and-seizure authorizations were abhorrent because they conferred excessive *discretion*, and

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2. The question of the constitutionality of "anticipatory" search warrants is a "subsidiary" of, and is "fairly included" within (Sup. Ct. R. 14.1(a)), the question presented in the Petition, which asked whether the Fourth Amendment requires the suppression of evidence when officers conduct a search under an "anticipatory" warrant *and* certain conditions are present. *See* Pet. at (I); *see also Yee* v. *Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."). It would have been futile for Respondent to press this argument below, in light of Ninth Circuit precedent. *See United States* v. *Hale*, 784 F.2d 1465, 1468-69 (9th Cir. 1986), *abrogated on other grounds as noted in United States* v. *Weber*, 923 F.2d 1338, 1343 n.6 (9th Cir. 1990).

hence excessive *power*, on the government agents holding them.

The "anticipatory" warrants that are the subject of this case would have incurred the condemnation of the generation of Americans who drafted, approved, and ratified the Fourth Amendment, because these warrants confer on government officials the power and discretion to reach their own conclusion as to when the "triggering events" giving rise to their search power have occurred. Worse yet, in many cases–including this one–these warrants effectively go a step further, empowering government agents to *create* the conditions that they may then treat as giving them the power to search and seize. In view of the sharp conflict between this form of warrant and the original spirit and purpose of the Fourth Amendment, the Court should hold that "anticipatory" warrants are unconstitutional.

ARGUMENT

I.
The Historical Background of the Fourth Amendment as an Expression of Abhorrence of Discretionary Searches

A.
General Warrants and Writs of Assistance in England

The historical record supplies no shortage of reasons for English and colonial American subjects to oppose broad-based governmental search-and-seizure authorizations. The preceding centuries had seen search-and-seizure practices evolve from a relatively uncontroversial set of methods for apprehending fleeing

felons and recovering contraband to an instrument of political, religious, and class-oriented governmental persecution.

In thirteenth century England, searches for fleeing criminals were effected by the ancient practice of the "hue and cry," which provided that subjects who witnessed a crime were to chase the perpetrator, blowing horns and shouting for others to join them.[3] Searches for, and seizure of, fleeing felons were conducted by the public, with minimal or no involvement of government officials, and no authorization to break into private dwellings.[4] Over the next two centuries, however, searches became both more extensive, with pursuers increasingly being permitted to enter private dwellings, and more a locus of government authority, as legislation empowered government officials to arrest persons suspected of past crimes.[5] By the fifteenth century, the Crown had begun issuing general authorizations empowering royal agents

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3. William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 52 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School). Cuddihy's dissertation, which we rely on extensively as a compendium of primary materials and a source of useful insights, was identified by Justice O'Connor as "one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken." *Vernonia School District* v. *Acton*, 515 U.S. 646, 669 (1995) (O'Connor, J., dissenting). Professor Morgan Cloud described it as "a model of the effort and objectivity that are hallmarks of legal history." Morgan Cloud, *Searching Through History; Searching For History*, 63 U. Chi. L. Rev. 1707, 1746 (1996).

4. Cuddihy, *supra* note 3, at 53-54.

5. *Id.* at 54-55.

to search for specified contraband or types of criminals.[6] While the legal framework for aggressive house-to-house searches had been articulated by the latter part of the fifteenth century, however, in practice this power was not widely exercised, and thus excited little opposition.[7]

Search-and-seizure practices underwent dramatic changes in the Tudor and early Stuart eras (1485-1642). Wide-ranging and highly-intrusive governmental searches came to be used as tools for "cleans[ing] the cities of vagabonds,"[8] regulating the entertainments and dress of the working classes,[9] and stifling political and religious nonconformity.[10] The latter two purposes were often overseen by two institutions that Revolutionary-era Americans came to view as emblematic of tyrannical and unjust government: the Privy Council and the Star Chamber. Both of these entities made it their practice to issue broad authorizations for aggressive search-and-seizure campaigns directed at entire categories of persons, places, or objects.[11] And because these search-and-seizure campaigns were used for their *in terrorem*

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6. *Id.* at 56.

7. *Id.* at 75-76, 79.

8. Procl. no. 16, n. p., 23 Dec. 1487 (cited in 1 *Tudor Royal Proclamations*, Paul L. Hughes and James F. Larkin eds., (1964-69) 17 (cited in Cuddihy, *supra* note 3, at 82)).

9. Cuddihy, *supra* note 3, at 84-85 (citing search authorizations directed at the playing of dice, bowls, and tennis, and the wearing of ostentatious headgear).

10. *Id.* at 115-99.

11. *Id.* at 115-16.

effect at least as much as for locating and seizing criminals or contraband, they became increasingly violent. Aggressive governmental house-to-house searches thus became a reality with which English subjects of all classes were intimately familiar, and opposition to these practices began to mount.

One of the earliest and most influential critiques came from Sir Edward Coke, who proclaimed in his 1642 treatise *Institutes of the Laws of England* that "for justices of peace to make warrants upon surmises, for breaking the houses of any subjects to search for felons, or stoln [*sic*] goods, is against Magna Carta."[12] Royal search practices were also attacked as unlawful and oppressive by Parliament, which resented the Crown's use of them as a tool for subduing and intimidating its members.[13]

By 1700, English scholars had begun to articulate a powerful critique of broad-based search authorizations, focusing specifically on the issuance of general warrants–*i.e.*, warrants that created broad authority to search and did not specify particular places that could be searched or things that could be seized. Nevertheless, such general warrants continued to be the norm in England, and continued to be used as tools of censorship and political control.[14]

Meanwhile, in 1662, the institution of "writs of assistance" was codified in English law, reinforcing yet

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12. 4 Sir Edward Coke, *The Institutes of the Laws of England* 176 (1642).

13. Cuddihy, *supra* note 3, at 242.

14. *Id.* at 292.

another legal basis for broad and indiscriminate governmental search-and-seizure authority. Similar writs had been in use for centuries, in the form of directions to peace officers to assist individuals in recovering money or property.[15] But the "Fraud Act" of 1662 regularized and broadened the writ, authorizing the issuance of writs empowering customs officials to "enter any house, shop, cellar, warehouse, or room or other place" and if necessary to "break open doors, chests, trunks and other packages" to locate and seize uncustomed goods.[16] As amended in 1701, the Act extended the duration of each such writ to six months after the death of the monarch in whose reign it was issued.[17] Technically, the customs officer's "writ of assistance" added little to the officer's *ex oficio* search authority.[18] In practice, however, the issuance of the writ reinforced and clarified the officer's authority, making it difficult or impossible for the subject of a search to claim in good faith that he had no obligation to permit the officer to conduct a search.[19]

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15. *Id.* at 299-300.

16. 13 and 14 Charles II, c. 11, sec. 5 (1662) (quoted in Cuddihy, *supra* note 3, at 306).

17. 1 Anne, stat. 1, c. 8, sec. 5 (1701) (cited in Cuddihy, *supra* note 3, at 306).

18. Cuddihy, *supra* note 3, at 650.

19. Thus, for example, Massachusetts Governor William Shirley directed the customs service to obtain writs of assistance from the colony's highest court, the Superior Court of Judicature, when the officers' *ex oficio* searches were repeatedly met with resistance and lawsuits. *See* 3 Thomas Hutchinson, *The History of Massachusetts* 92 (1764-1828) (cited in Cuddihy, *supra* note 3, at 731).

B.
The Colonial and Revolutionary American Experience with General Warrants and Writs of Assistance

Although America was destined to leap far ahead of Britain in rejecting broad governmental search-and-seizure authority, colonial Americans remained relatively sanguine with respect to these practices until the 1760s. Americans were familiar with the ancient principle that "a man's home was his castle," and on occasion would invoke it in support of the proposition that government officials could not invade the privacy of their homes under *any* circumstances.[20] But, notwithstanding their awareness of British scholars' attacks on the legality of general warrants,[21] colonial Americans did not broadly condemn them, and in fact treated them as the default mechanism for authorizing searches.[22] Indeed, Americans owned and used British legal treatises, which included proposed forms of search warrants, virtually all of them general in nature.

Notably, a form of general warrant known as a "Dormant Warrant," which resembled the present-day "anticipatory" warrant insofar as it was issued in view of possible future, rather than actual past, crimes, appeared in a number of these treatises. Richard Kilburne's *Choice Precedents Relating to the Office of a Justice of Peace* included a form of "Warrant Dormant" that authorized the holder to search suspicious places as often as he wished for up to

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20. *See* Cuddihy, *supra* note 3, at 363-69.

21. *See id.* at 370.

22. *See id.* at 376.

a year after an unsolved theft, in the anticipation that further thefts might occur during that time.[23] Kilburne's treatise was on bookshelves from Francis Dana's in Massachusetts to William Byrd's in Virginia.[24] Virtually the same sort of warrant, designed to be issued in anticipation of an outbreak of larcenies, appeared as a "Lodging Warrant" in other contemporary legal manuals. The "Lodging Warrant" authorized officials to "make diligent search in the most suspicious Places . . . for goods stoln [*sic*]" whenever and as frequently as the officer saw fit.[25] These "Dormant" and "Lodging" warrants were among the forms of general warrant familiar to Colonial Americans, and, by the same token, were among the forms of warrant that Americans later resolved to banish forever from the American legal landscape. *See Atwater* v. *City of Lago Vista*, 532 U.S. 318, 339-40 (2001) (citing *United States* v. *Watson*, 423 U.S. 411, 429 (1976) (Powell, J., concurring)); *Vernonia School District* v. *Acton*, 515 U.S. 646, 669 (1995) (O'Connor, J., dissenting).

Notwithstanding the colonial governments'

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23. Richard Kilburne, *Choice Precedents Relating to the Office of a Justice of Peace* 406-07 (6th ed. 1700) (cited in Cuddihy, *supra* note 3, at 288-89). Similar "dormant" form warrants appeared in at least two other contemporary treatises. *See* John Bond, *Collection of Precedents* 507 (2d ed. 1696); Henry Care and William Nelson, *English Liberties* 177-78 (1700) (cited in Cuddihy, *supra* note 3, at 289 n.11).

24. *See* Herbert Johnson, comp., *Imported Eighteenth Century Law Treatises in American Libraries* 35 (Knoxville 1978) (cited in Cuddihy, *supra* note 3, at 466-67 n.15).

25. Giles Jacob, *Lex Mercatoria* 169 (3d ed. 1720); *see also* Joseph Higgs, *A Guide to Justices* 101-02 (3d ed. 1750) (cited in Cuddihy, *supra* note 3, at 625-26 & n.79).

practice of issuing general warrants, these warrants had not sparked widespread condemnation in America prior to 1760. The reason is simple: Although colonial governments turned to general warrants fairly routinely, they did not do so very frequently.[26] Nor did colonial governments have the means to effectuate broad and oppressive searches. Even major cities such as Boston and New York had at most a handful of constables, and those they had were unpaid members of the community who served for only a year before the job rotated to another, all the while keeping their regular jobs.[27] In contrast to the violent searches by professional proto-armies that had characterized Tudor and early Stuart England, the colonial American experience of general searches had been more akin to "letting one's brother-in-law and the merchant next door look under the kitchen table for Farmer Brown's stolen pewterware."[28]

A few factors led to the rapid turnabout in American attitudes after 1760. For one thing, the British government's practices with respect to customs searches stood in stark contrast to the general law-enforcement searches carried out by local constables. Perhaps because of the generally non-violent, surreptitious, and ostensibly victimless nature of smuggling, customs laws had always been accompanied by general search-and-seizure authority.[29] Moreover, enforcement of these laws was overseen, not by colonial governments and unpaid part-

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26. *See* Cuddihy, *supra* note 3, at 375.

27. *See id.* at 497-503.

28. *Id.* at 504.

29. *See id.* at 58.

time constables, but by the British government and its professional agents. English customs officers aggressively exercised their general search powers in the colonies, and by 1760 Americans' resentment of these harsh practices had become pronounced.[30]

Still more crucial to the sea change in Americans' opinions, however, was a trilogy of celebrated legal standoffs over search-and-seizure authority that occurred on both sides of the Atlantic between 1761 and 1776.

1.
James Otis' Argument in the 1761 Writ of Assistance Case (*Paxton's Case*)

The first occurred in Massachusetts in 1761, after the death of George II in October of 1760 caused the writs of assistance issued during his reign to expire automatically, pursuant to the Fraud Act of 1662.[31] After customs official Charles Paxton applied to the Superior Court for the issuance of new writs, a group of Boston merchants petitioned the Superior Court to hear argument against the issuance of the writs. Surveyor General of the Customs Thomas Lechmere petitioned to be heard in support of the writs. The court agreed to hear arguments, and the merchants retained James Otis, Jr., the Crown's chief attorney in Massachusetts and son of one of the colony's most powerful politicians, to help argue

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30. *See id.* at 518.

31. *See supra* at 7 & n.16; 2 L. Kinvin Wroth and Hiller B. Zobel, eds., *Legal Papers of John Adams* 112 (Harvard University Press 1965) ("*Adams Legal Papers*").

their side of the case.[32]

As the two sides squared off in the Council Chamber of what is now the Old State House in Boston, a young Boston lawyer and patriot, and future author of the State search-and-seizure provision generally viewed as the Fourth Amendment's nearest ancestor,[33] sat "lost in Admiration."[34] John Adams, then 25 years old, would later proclaim Otis' argument against the Writs of Assistance "the first scene of the first Act of Opposition to

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32. *See* Cuddihy, *supra* note 3, at 763-65.

33. John Adams authored the 1780 Massachusetts Constitution and Declaration of Rights, which included the following provision:

> Art. XIV. Every subject has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the person or objects of search, arrest, or seizure: And no warrant ought to be issued, but in cases, and with the formalities, prescribed by the laws.

Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 684-85 (1999). Professor Amar has noted that "[t]he language, logic and structure of the Massachusetts Constitution's Article XIV rather clearly foreshadow the federal Fourth Amendment." Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 Suffolk U. L. Rev. 53, 67 (1996).

34. *Adams Legal Papers*, *supra* note 31, at 106.

the arbitrary Claims of Great Britain," adding: "[t]hen and there the child Independence was born."[35]

Adams' "Abstract" of Otis' argument, a version of which was published in the *Massachusetts Spy* in 1773,[36] indicates that among Otis' indictments of the writ was the fact that it empowered those holding it to search Americans' homes at their individual–and likely arbitrary and malicious–discretion. Otis complained that "every one with this writ may be a tyrant," and that "Custom house officers may enter our houses when they please . . . their menial servants may enter . . . and whether they break through malice or revenge, no man, no court can inquire."[37]

But Otis went beyond merely indicting general warrants and writs of assistance, adding that there was one form of search authorization that "may be legal":

> *special writs, directed to special officers,* and to search *certain houses,* &c. especially set forth in the writ, may be granted by the Court of Exchequer, at home, *upon oath made before* the Lord Treasurer by the person, who asks, *that he suspects such goods to be concealed in* THOSE VERY PLACES HE DESIRES TO SEARCH.[38]

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35. March 29, 1817 Letter from John Adams to William Tudor (quoted in *Adams Legal Papers, supra* note 31, at 107).

36. *See id.* at 134-35 n.103.

37. *Id.* at 142.

38. *Id.* at 141.

Although Otis' broader theme, that the British Government's arbitrary claims could be declared contrary to fundamental legal principles, was more the focus of Adams' loftiest encomiums, the latter assertion–that specific warrants could be an acceptable substitute for general warrants and writs–was more essential to the development of the principles that would later be enshrined in the Fourth Amendment. Otis here picked up on a discussion that had originated a few decades earlier among British critics of the general warrant.[39]

In the preceding decades, many of the general warrant's British opponents had gone beyond simply attacking the warrant, and had begun grappling with the question of what might serve as a suitable replacement. What sort of replacement could be considered suitable, of course, turned on what aspect of the institution of the general warrant was seen as most abhorrent. If the chief objection was that the searches conducted pursuant to the warrants were too intrusive, it might be declared that the degree of penetration involved in searches must be constrained across-the-board. If it were that the searches were too violent, the proper remedy might be measures regulating the methods that the searchers could employ. If it were that the searches tended to be used as instruments of oppression against nonconformists and political opponents, a measure such as approval of the warrant by a diverse panel of reviewers might be suggested.

For these critics, however, the chief evil of the general warrant was none of these things, but rather their vesting of *discretion* in the searching official. Thus, one of

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39. *See* Cuddihy, *supra* note 3, at 535-60.

these scholars declared it "extremely hard to leave it to the discretion of a Common officer to arrest what Persons, and search what Houses he thinks fit."[40] Another asserted that allowing gamekeepers "to search what places they shall think proper" for poached animals would constitute an excessive grant of power.[41] As the House of Commons considered a general Navy impressment warrant, Sir John Barnard warned that such warrants placed an "unlimited power" in the hands of petty officers to "insist upon searching the house of any gentleman or any nobleman of the neighborhood."[42] In the upper house, Lord Gage similarly warned that the bill would subject every Englishman's home to forcible entry and search at "the caprice and insolence of every dirty little officer."[43]

These English critics recommended that the problem of excessive search-and-seizure discretion be solved by favoring the use of specific warrants, which narrowly cabin the officer's power to search for particularly-identified things in particularly-identified places, rather than authorizing them to break open and

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40. 2 William Hawkins, *Treatise of the Pleas of the Crown* 82 (1721) (quoted in Cuddihy, *supra* note 3, at 539).

41. 1 Richard Burn, *The Justice of Peace* 439 (1755) (quoted in Cuddihy, *supra* note 3, at 547).

42. March 6, 1740 Comments of Sir John Barnard, 20 *A Collection of the Parliamentary Debates in England from the year M, DC, LXVIII* 258-59 (1741) (quoted in Cuddihy, *supra* note 3, at 551-52).

43. March 6, 1740 Comments of Lord Gage, 3 *The Scots Magazine* 324 (quoted in Cuddihy, *supra* note 3, at 552).

search dwellings essentially at their whim. Recognizing that open-ended grants of search-and-seizure authority amounted to invitations to arbitrary, harassing, and malicious behavior, likely driven by class resentment, avarice, malice, or some combination of these motivations, these critics settled on an approach to grants of search-and-seizure authority that would cabin that power as narrowly as possible, while still allowing the officers to perform their proper functions.[44]

Despite his eloquence in advocating for the specific warrant, Otis lost *Paxton's Case*. The court suspended the proceedings in order to inquire into English policy on the writ question, and, after receiving assurances that the English Court of Exchequer granted the writs as a matter of course, rejected the merchants' challenge.[45] But Otis' widely-publicized arguments against the general warrant and in favor of the specific form gained tremendous currency among colonial Americans.[46] Commentators castigated the customs officials, and enthusiastically echoed Otis' condemnations of the writs' discretionary nature, decrying the issuance of writs that allowed a customs official to "ENTER FORCEABLY into a DWELLING HOUSE, and rifle every part of it, where he shall PLEASE to suspect uncustom'd goods are lodg'd."[47] Soon after, Otis won a seat in the Massachusetts House of

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44. Cuddihy, *supra* note 3, at 553-58.

45. *Id.* at 796-98.

46. *See* Davies, *supra* note 33, at 561 n.20.

47. Boston Gazette and Country Journal, Nov. 23, 1761 at 3 (quoted in Cuddihy, *supra* note 3, at 801).

Representatives by a nearly unanimous vote,[48] while in the 1765 Stamp Act Riot, Chief Justice Thomas Hutchinson, who had ruled against Otis and in favor of the writs, saw his house destroyed by rioters "with a savageness unknown in a civilized country."[49] Massachusetts Governor Sir Francis Bernard ascribed the violence to the rioters' memory of Hutchinson's role in *Paxton's Case*, informing the Lords of Trade that "[t]he Chief Justice took the lead in the Judgment for granting Writs, and now he has paid for it."[50] By giving forceful voice to colonial Americans' fierce resentment of discretionary searches, Otis had hammered the first nail in the coffin of the general warrant in America.

2.
Chief Justice Pratt's Opinions in *The Wilkesite Cases*

The controversy over *Paxton's Case* had barely subsided when a new high-profile conflict over search-and-seizure authority arose, this time in England. In 1762, Member of Parliament John Wilkes began anonymously publishing a series of pamphlets entitled the *North Briton*, which derided and criticized the governing party.[51] When Issue 45, with its especially harsh attack upon a speech given by the King, appeared,

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48. Cuddihy, *supra* note 3, at 817.

49. Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 68 (The Johns Hopkins Press 1937).

50. Letter from Sir Francis Bernard to the Lords of Trade (quoted in Lasson, *supra* note 49, at 68).

51. Lasson, *supra* note 49, at 43.

the Secretary of State issued a warrant directing several messengers "to make strict and diligent search for the authors, printers, and publishers" of the pamphlet, and "to apprehend and seize [them], together with their papers."[52]

Having thus been granted an open-ended power to arrest, search and seize at their discretion, the messengers proceeded to arrest forty-nine people in three days.[53] Eventually they learned from one of them that Wilkes was the author of Issue 45, and confronted him at his home. Wilkes pronounced the messengers' warrant invalid and refused to submit to an arrest or search, whereupon the messengers carried him in a chair to the Secretary of State's office. They then returned to ransack Wilkes' house and seize all of his papers and effects.[54]

Eager to turn the arrest and search into yet another embarrassment for the government, Wilkes filed a dozen separate trespass suits within a month, and many of his cohorts followed suit.[55] These suits culminated in a number of widely-noted decisions, among them Chief Justice Pratt's eloquent condemnation of general warrants in *Wilkes* v. *Wood*. The Chief Justice declared:

> The defendants claimed a right under precedents to force persons' houses, break open escritoires, seize their papers, upon a general warrant, where no

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52. *Id.*

53. *Id.* at 43-44.

54. *Id.* at 44.

55. Cuddihy, *supra* note 3, at 894.

> inventory is made of the things taken away, and where no offenders' names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.[56]

Further critiques of arrests and seizures pursuant to open-ended warrants were issued by Chief Justice Pratt and his colleagues in companion cases relating to Issue 45 of the *North Briton*.[57] On appeal of the decision in *Leach* v. *Money* to the King's Bench, Chief Justice Pratt's views were seconded by Chief Justice Mansfield, who opined: "It is not fit that the judging of the information should be left to the officer. The magistrate should judge, and give certain directions to the officer."[58]

The Wilkesite decisions attracted wide attention, and British papers printed enthusiastic affirmations of *Wilkes* v. *Wood*'s condemnation of discretionary searches.[59] The cases also received "[m]assive coverage"

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56. *Wilkes* v. *Wood*, Lofft 1; 98 Eng. Rep. 489 (quoted in Lasson, *supra* note 49 at 45).

57. *See* Cuddihy, *supra* note 3, at 896-907.

58. *Money* v. *Leach*, 3 Burr. 1692, 1742, 97 Eng. Rep. 1050, 1075 (quoted in Lasson, *supra* note 49, at 47).

59. *The Monitor* described the secretarial warrant as a device employed "to empower mean, Low-lif'd ignorant men to enter, and to act at discretion, and to overhaul things of the

in the American colonial press, which was "overwhelmingly sympathetic to Wilkes."[60] Moreover, people on both sides of the Atlantic were aware of Sir William Blackstone's condemnation of general warrants–which was based on the Court of King's Bench proceedings in *Leach*–in his 1769 *Commentaries on the Laws of England*.[61] Blackstone declared that "[a] general warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty; for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the grounds of suspicion."[62]

The aggregate effect of these events on the minds of colonial Americans was dramatic. Hostility to general search-and-seizure authorizations "came not only from colonial judges but from town meetings, the Continental Congress, quasi-governmental agencies, pamphleteers, essayists, and the man-on-the-street."[63] A 1772 Boston town meeting resolved that customs officers' general

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m[o]st private nature . . . ." *Monitor, or British Freeholder*, Feb. 11, 1764, at 2595 (quoted in Cuddihy, *supra* note 3, at 934). *The London Magazine* declared that giving customs officers "a discretionary power to search for and seize whatsoever they should please to suspect" contravened England's laws and constitution. 34 *London Magazine* 283 (1765) (quoted in Cuddihy, *supra* note 3, at 935).

60. Cuddihy, *supra* note 3, at 1105.

61. *See* Davies, *supra* note 33, at 566 n.27.

62. 4 William Blackstone, *Commentaries on the Laws of England* 288 (1769) (quoted in Davies, *supra* note 33, at 580 n.78).

63. Cuddihy, *supra* note 3, at 1110.

search authority furnished every petty officer "with power more absolute and arbitrary than ought to be lodged in the hands of any man or body whatsoever."[64]

3.
Efforts to Enforce The Townshend Acts with Writs of Assistance

Meanwhile, notwithstanding their victory in *Paxton's Case*, English customs officials continued to face obstacles in employing writs of assistance to search for and seize uncustomed goods in America. When customs officials attempted to search the cabinets of merchant Daniel Malcolm's house, he threatened to kill them if they broke the lock on a particular cabinet. After the officials had reported the incident to English officials, the English Attorney General and Solicitor General recommended that no prosecution be instituted, on the ground that the officials' writ was invalid.[65] One result was the enactment of writ-related provisions of a series of laws that came to be known as the Townshend Acts, after Chancellor of the Exchequer Charles Townshend, who oversaw their drafting and implementation.[66] By closing loopholes and clarifying matters that had been left to interpretation, such as which colonial courts were authorized to grant the writs, these provisions of the Townshend Acts were intended to remove all doubts regarding the writs' legality.

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64. "A List of Infringements and Violations of Rights," November 20, 1774, *Votes and Proceedings of the Freeholders of Boston* 16-17 (quoted in Cuddihy, *supra* note 3, at 1112).

65. Lasson, *supra* note 49, at 68-69.

66. *Id.* at 70.

But the Act could not purport to eliminate the higher-level critique of the writs that James Otis had pronounced in *Paxton's Case*, or that Chief Justices Pratt and Mansfield had articulated in the *Wilkesite Cases*. As customs officials, armed with the Townshend Acts, sought the colonial courts' cooperation in procuring writs of assistance in the latter 1760s, they soon discovered that these views had become firmly entrenched in America. Although a few colonial courts obliged, several not only refused, but in doing so cited rationales that closely tracked Otis' attack from the beginning of the decade. The judges in Pennsylvania, for example, opined that "arming officers of the Customs with so extensive a power, to be exercised totally at their own discretion would be of dangerous consequences and was not warranted by Law."[67] Chief Justice William Drayton, of the Florida provinces, explained that he "d[id] not think [him]self justified by Law to issue general writs for that purpose to be lodged in the hands and to be used discretionally (perhaps without proper foundation) at the will of subordinate officers."[68]

The Virginia courts agreed to grant writs, but insisted on drafting suitable versions, rather than following the forms provided by the customs officials. This course was sufficiently troubling to the English authorities to generate an indignant letter from the

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67. July 3, 1773 Letter of the Customs Officers at Philadelphia to the Customs Commissioners (quoted in O.M. Dickerson, *Writs of Assistance as a Cause of the Revolution*, in Richard B. Morris, ed., *The Era of the American Revolution* 60-61 (Columbia University Press 1939)).

68. November 17, 1772 Letter from William Drayton to William Cummings (quoted in Dickerson, *supra* note 67, at 64).

Treasury Board to the Attorney General lamenting:

> most of the [American] judges refused to grant [the] writs alledging [*sic*] that no information had been made to them of any special occasion for such writ, and unless such Information was made to them on oath they could not legally grant them, it being unconstitutional to lodge such a Writ in the hands of the officer which gave him unlimited power to act under it according to his own arbitrary Discretion.[69]

From the Virginia confrontation over the writs, a direct line of succession may be traced through the various State declarations of rights to the federal Bill of Rights' Fourth Amendment. Virginia in 1776 became the first State to formally condemn general warrants in such a declaration of rights,[70] and the six additional States that enacted declarations or bills of rights between 1776 and 1784 all included such a provision.[71] As noted above, John Adams, who had looked on with reverence nineteen years earlier as James Otis eloquently proclaimed discretionary search-and-seizure authority intolerable, authored Massachusetts' 1780 version, which came very near to the Fourth Amendment in its structure and

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69. August 31, 1772 Correspondence with Attorney General Edward Thurston (quoted in Dickerson, *supra* note 67, at 69). Thurston in response declared it "strange indeed, that any judge in the colonies should think the laws of the mother too harsh for the temper of American Liberty." *Id.* at 71.

70. *See* Lasson, *supra* note 49, at 79 & n.3.

71. *See id.* at 80-82 & nn.9-17.

wording.[72]

II.
"Anticipatory" Warrants' Essential Resemblance to General Warrants and Writs of Assistance

The moral of this history is plain: The spirit animating the Fourth Amendment is an abhorrence for governmental search-and-seizure authorizations that place excessive *discretion*, and thus excessive *power*, in the hands of government agents.[73] Warrants that fail to particularize in *all* possible respects the outer boundaries of the search-and-seizure power that they create therefore fly directly in the face of the core principle of the Fourth Amendment.

Equally importantly, it has never been sufficient for this cabining of the official's discretion to be effected in terms that leave room for *interpretation* on the part of

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72. *See supra* note 33.

73. *See* Davies, *supra* note 33, at 580-82 (noting the Revolutionary generation's "deep-rooted distrust and even disdain for the judgment of ordinary officers"); Tracy Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. Rev. 925, 970-71 (1997) (noting that the purpose of the Massachusetts Declaration of Rights' search-and-seizure provision was "to restrain the discretion of officers and executive officials"); Tracy Maclin, *When the Cure for the Fourth Amendment is Worse Than the Disease*, 68 S. Cal. L. Rev. 1, 19-20 (1994) ("the search and seizure practices of the British authorities were opposed because of the arbitrary power exercised by customs officers and Crown officials. The Fourth Amendment was adopted to deter federal officials from exercising similar unrestrained power.").

the official–a flaw that inevitably allows the low-level official discretion reviled by the Framing generation to seep back in. Indeed, if this piece of the puzzle is overlooked, even the hated general warrants of the 1760s would have to be considered acceptable, because even they on their face normally delimited the permissible objects of the search and seizure–for example, by specifying that the officer must be seeking evidence of a particular crime, or particular contraband. In most cases, their flaw was not that they failed to particularize *at all*, but that they particularized in a manner that left room for the officer to make on-the-scene judgments as to whether particular searches and seizures were appropriate.

It is therefore unsurprising that the Fourth Amendment's particularity requirement reflects a remarkably emphatic effort to delineate boundaries to the officer's search-and-seizure authority that leave *no* room for on-the-scene judgment calls: The warrant must "*particularly* describ[e] the *place to be searched*, and the *persons or things to be seized*."[74] Officers not only are not trusted to decide for themselves whether a person or home is "suspicious," likely to be involved in a particular crime, or the object of a reliable tip–they are literally trusted to decide nothing beyond whether the "person" "place" or "thing" before them is the same as specified in the warrant. It is only a little exaggeration to suggest that if the Framers could have required that searches and seizures be conducted by programmable automatons, they would have done so.

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74. U.S. Const. amend. IV (emphases added).

The recent[75] innovation of allowing searches and seizures pursuant to "anticipatory" warrants is profoundly contrary to this core anti-discretion principle of the Fourth Amendment. Pursuant to these forms of warrant, low-level law enforcement officials are handed a partially-blank check, authorized to decide on their own whether the "triggering event" specified in the warrant really has occurred. Indeed, it is self-evident that the "anticipatory" warrant undermines the Fourth Amendment's oath requirement: The required oath is meant to compel the officer to swear to the existence of facts that establish probable cause–but since an officer executing an "anticipatory" warrant does not swear an oath that the "triggering event" actually has occurred before conducting the search, any oath provided with respect to such a warrant is necessarily incomplete.

It gets worse: In many cases, including this one, "anticipatory" warrants not only vest low-level officers with the power to determine whether a "triggering" event has occurred, but also empower them to *bring about* the very conditions that they may then treat as having "triggered" their authority. The search at issue here illustrates the point. At 7:19 a.m. on April 19, 2002, as Jeffrey Grubbs and his wife prepared their children for school, the postal inspectors huddled outside of his home had a piece of paper that accorded them no power to enter or search his home. At 7:20, however, one of them went to Grubbs' door and handed his wife a package. A few minutes later – with no new intervention by any

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75. *See* Norma Rotunno, Annotation, *Validity of Anticipatory Search Warrants–State Cases*, 67 A.L.R.5th 361, 361 (1993) (noting that "anticipatory" search warrants are a "relatively recent law enforcement tool").

magistrate and no new binding oath by any officer–the inspectors determined that their actions had activated the latent power of their "anticipatory" warrant. They immediately descended on Grubbs' home, compelled his wife to let them enter, and searched the entire house as well as his children's backpacks. Pet. App. at 4a-6a. Armed with their "anticipatory" warrant, these low-level officials literally created, and then ratified, their own power to search Grubbs' home and seize his property.[76]

This description of the facts of this case is sufficient in itself to establish that, in light of its profoundly discretionary character, the "anticipatory" warrant would have inspired the same revulsion on the part of the Framing generation that greeted such instruments of discretionary search authority as the general warrant and the writ of assistance. In order to be faithful to the essential purpose and design of the Fourth Amendment, the Court should hold that the "anticipatory" warrant is unconstitutional.

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76. Caselaw provides still more dramatic examples of officers' on-the-scene exercises of discretion pursuant to "anticipatory" warrants. *See, e.g., United States* v. *Rowland*, 145 F.3d 1194 (10th Cir. 1998) (warrant was to be served when package was brought into target's residence; after electronic beeper in package stopped functioning while package was at target's office, officers surmised that target took the package from his office into his home, served the warrant, and searched his home); *State* v. *Nusbaum*, 107 P.3d 768 (Wash. Ct. App. 2005) (warrant was to be served when delivery of package was accepted by person at target's residence; after target's fingers touched the package and delivery person yanked it back, agents arrested target in his front yard, served the warrant, and searched his home).

CONCLUSION

For the foregoing reasons, amici urge the Court to affirm the judgment below.

Respectfully submitted,

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December 19, 2005

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* GRUBBS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04–1414. Argued January 18, 2006—Decided March 21, 2006

A Magistrate Judge issued an "anticipatory" search warrant for respondent Grubbs' house based on a federal officer's affidavit. The affidavit explained that the warrant would not be executed until a parcel containing a videotape of child pornography—which Grubbs had ordered from an undercover postal inspector—was received at, and physically taken into, the residence. The affidavit also referred to two attachments describing the residence and the items to be seized. After the package was delivered and the search commenced, Grubbs was given a copy of the warrant, which included the attachments but not the supporting affidavit. When he admitted ordering the videotape, he was arrested, and the videotape and other items were seized. Following his indictment for receiving child pornography, see 18 U. S. C. §2252(a)(2), Grubbs moved to suppress the seized evidence, arguing, *inter alia*, that the warrant was invalid because it failed to list the triggering condition. The District Court denied the motion, and Grubbs pleaded guilty. The Ninth Circuit reversed, concluding that the warrant ran afoul of the Fourth Amendment's particularity requirement, which, under Circuit precedent, applied to the conditions precedent to an anticipatory warrant.

Held:

1. Anticipatory warrants are not categorically unconstitutional under the Fourth Amendment's provision that "no Warrants shall issue, but upon probable cause." Probable cause exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois* v. *Gates*, 462 U. S. 213, 238. When an anticipatory warrant is issued, the fact that the contraband is not presently at the place described is immaterial, so long as there is probable cause to believe it will be there when the warrant is executed.

Syllabus

Anticipatory warrants are, therefore, no different in principle from ordinary warrants: They require the magistrate to determine (1) that it is *now probable* that (2) contraband, evidence of a crime, or a fugitive *will be* on the described premises (3) when the warrant is executed. Where the anticipatory warrant places a condition (other than the mere passage of time) upon its execution, the first of these determinations goes not merely to what will probably be found *if* the condition is met, but also to the likelihood that the condition *will* be met, and thus that a proper object of seizure will be on the described premises. Here, the occurrence of the triggering condition—successful delivery of the videotape—would plainly establish probable cause for the search, and the affidavit established probable cause to believe the triggering condition would be satisfied. Pp. 3–7.

2. The warrant at issue did not violate the Fourth Amendment's particularity requirement. The Amendment specifies only two matters that the warrant must "particularly describ[e]": "the place to be searched" and "the persons or things to be seized." That language is decisive here; the particularity requirement does not include the conditions precedent to execution of the warrant. Cf. *Dalia* v. *United States*, 441 U. S. 238, 255, 257. Respondent's two policy rationales—that setting forth the triggering condition in the warrant itself is necessary (1) to delineate the limits of the executing officer's power and (2) to allow the individual whose property is searched or seized to police the officer's conduct—find no basis in either the Fourth Amendment or Federal Rule of Criminal Procedure 41. Pp. 7–9.

377 F. 3d 1072 and 389 F. 3d 1306, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and BREYER, JJ., joined, and in which STEVENS, SOUTER, and GINSBURG, JJ., joined as to Parts I and II. SOUTER, J., filed an opinion concurring in part and concurring in the judgment, in which STEVENS and GINSBURG, JJ., joined. ALITO, J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–1414

UNITED STATES, PETITIONER *v.* JEFFREY GRUBBS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[March 21, 2006]

JUSTICE SCALIA delivered the opinion of the Court.

Federal law enforcement officers obtained a search warrant for respondent's house on the basis of an affidavit explaining that the warrant would be executed only after a controlled delivery of contraband to that location. We address two challenges to the constitutionality of this anticipatory warrant.

I

Respondent Jeffrey Grubbs purchased a videotape containing child pornography from a Web site operated by an undercover postal inspector. Officers from the Postal Inspection Service arranged a controlled delivery of a package containing the videotape to Grubbs' residence. A postal inspector submitted a search warrant application to a Magistrate Judge for the Eastern District of California, accompanied by an affidavit describing the proposed operation in detail. The affidavit stated:

> "Execution of this search warrant will not occur unless and until the parcel has been received by a person(s) and has been physically taken into the residence . . . . At that time, and not before, this search warrant will be executed by me and other United

> States Postal inspectors, with appropriate assistance from other law enforcement officers–in accordance with this warrant's command." App. to Pet. for Cert. 72a.

In addition to describing this triggering condition, the affidavit referred to two attachments, which described Grubbs' residence and the items officers would seize. These attachments, but not the body of the affidavit, were incorporated into the requested warrant. The affidavit concluded:

> "Based upon the foregoing facts, I respectfully submit there exists probable cause to believe that the items set forth in Attachment B to this affidavit and the search warrant, will be found [at Grubbs' residence], which residence is further described at Attachment A." *Ibid.*

The Magistrate Judge issued the warrant as requested. Two days later, an undercover postal inspector delivered the package. Grubbs' wife signed for it and took the unopened package inside. The inspectors detained Grubbs as he left his home a few minutes later, then entered the house and commenced the search. Roughly 30 minutes into the search, Grubbs was provided with a copy of the warrant, which included both attachments but not the supporting affidavit that explained when the warrant would be executed. Grubbs consented to interrogation by the postal inspectors and admitted ordering the videotape. He was placed under arrest, and various items were seized, including the videotape.

A grand jury for the Eastern District of California indicted Grubbs on one count of receiving a visual depiction of a minor engaged in sexually explicit conduct. See 18 U. S. C. §2252(a)(2). He moved to suppress the evidence seized during the search of his residence, arguing as relevant here that the warrant was invalid because it failed to

list the triggering condition. After an evidentiary hearing, the District Court denied the motion. Grubbs pleaded guilty, but reserved his right to appeal the denial of his motion to suppress.

The Court of Appeals for the Ninth Circuit reversed. 377 F. 3d 1072, amended, 389 F. 3d 1306 (2004). Relying on Circuit precedent, it held that "the particularity requirement of the Fourth Amendment applies with full force to the conditions precedent to an anticipatory search warrant." 377 F. 3d, at 1077–1078 (citing *United States* v. *Hotal*, 143 F. 3d 1223, 1226 (CA9 1998)). An anticipatory warrant defective for that reason may be "cur[ed]" if the conditions precedent are set forth in an affidavit that is incorporated in the warrant and "presented to the person whose property is being searched." 377 F. 3d, at 1079. Because the postal inspectors "failed to present the affidavit—the only document in which the triggering conditions were listed"—to Grubbs or his wife, the "warrant was . . . inoperative, and the search was illegal." *Ibid.* We granted certiorari. 545 U. S. ___ (2005).

II

Before turning to the Ninth Circuit's conclusion that the warrant at issue here ran afoul of the Fourth Amendment's particularity requirement, we address the antecedent question whether anticipatory search warrants are categorically unconstitutional.[1] An anticipatory warrant is "a warrant based upon an affidavit showing probable

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[1]This issue is "predicate to an intelligent resolution of the question presented." *Ohio* v. *Robinette*, 519 U. S. 33, 38 (1996) (internal quotation marks omitted). It makes little sense to address what the Fourth Amendment requires of anticipatory search warrants if it does not allow them at all. Cf. *Wilkinson* v. *Austin*, 545 U. S. ___, ___ (2005) (slip op., at 9) (addressing whether inmates had a liberty interest in avoiding assignment to a "Supermax" prison, despite the State's concession that they did, because "[w]e need reach the question of what process is due only if the inmates establish a constitutionally protected liberty interest").

cause that at some future time (but not presently) certain evidence of crime will be located at a specified place." 2 W. LaFave, Search and Seizure §3.7(c), p. 398 (4th ed. 2004). Most anticipatory warrants subject their execution to some condition precedent other than the mere passage of time—a so-called "triggering condition." The affidavit at issue here, for instance, explained that "[e]xecution of th[e] search warrant will not occur unless and until the parcel [containing child pornography] has been received by a person(s) and has been physically taken into the residence." App. to Pet. for Cert. 72a. If the government were to execute an anticipatory warrant before the triggering condition occurred, there would be no reason to believe the item described in the warrant could be found at the searched location; by definition, the triggering condition which establishes probable cause has not yet been satisfied when the warrant is issued. Grubbs argues that for this reason anticipatory warrants contravene the Fourth Amendment's provision that "no Warrants shall issue, but upon probable cause."

We reject this view, as has every Court of Appeals to confront the issue, see, *e.g.*, *United States* v. *Loy*, 191 F. 3d 360, 364 (CA3 1999) (collecting cases). Probable cause exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois* v. *Gates*, 462 U. S. 213, 238 (1983). Because the probable-cause requirement looks to whether evidence will be found *when the search is conducted*, all warrants are, in a sense, "anticipatory." In the typical case where the police seek permission to search a house for an item they believe is already located there, the magistrate's determination that there is probable cause for the search amounts to a prediction that the item will still be there when the warrant is executed. See *People* v. *Glen*, 30 N. Y. 2d 252, 258, 282 N. E. 2d 614, 617 (1972) ("[P]resent possession is

only probative of the likelihood of future possession.").[2] The anticipatory nature of warrants is even clearer in the context of electronic surveillance. See, *e.g.*, *Katz* v. *United States*, 389 U. S. 347 (1967). When police request approval to tap a telephone line, they do so based on the probability that, during the course of the surveillance, the subject *will* use the phone to engage in crime-related conversations. The relevant federal provision requires a judge authorizing "interception of wire, oral, or electronic communications" to determine that "there is probable cause for belief that particular communications concerning [one of various listed offenses] *will be obtained* through such interception." 18 U. S. C. §2518(3)(b) (emphasis added); see also *United States* v. *Ricciardelli*, 998 F. 2d 8, 11, n. 3 (CA1 1993) ("[T]he magistrate issues the warrant on the basis of a substantial probability that crime-related conversations will ensue."). Thus, when an anticipatory warrant is issued, "the fact that the contraband is not presently located at the place described in the warrant is immaterial, so long as there is probable cause to believe that it will be there when the search warrant is executed." *United States* v. *Garcia*, 882 F. 2d 699, 702 (CA2 1989) (quoting *United States* v. *Lowe*, 575 F. 2d 1193, 1194 (CA6 1978); internal quotation marks omitted).

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[2]For this reason, probable cause may cease to exist after a warrant is issued. The police may learn, for instance, that contraband is no longer located at the place to be searched. See, *e.g.*, *United States* v. *Bowling*, 900 F. 2d 926, 932 (CA6 1990) (recognizing that a fruitless consent search could "dissipat[e] the probable cause that justified a warrant"). Or the probable-cause showing may have grown "stale" in view of the time that has passed since the warrant was issued. See *United States* v. *Wagner*, 989 F. 2d 69, 75 (CA2 1993) ("[T]he facts in an affidavit supporting a search warrant must be sufficiently close in time to the issuance of the warrant and the subsequent search conducted so that probable cause can be said to exist as of the time of the search and not simply as of some time in the past."); see also *Sgro* v. *United States*, 287 U. S. 206, 210–211 (1932).

Anticipatory warrants are, therefore, no different in principle from ordinary warrants. They require the magistrate to determine (1) that it is *now probable* that (2) contraband, evidence of a crime, or a fugitive *will be* on the described premises (3) when the warrant is executed. It should be noted, however, that where the anticipatory warrant places a condition (other than the mere passage of time) upon its execution, the first of these determinations goes not merely to what will probably be found *if* the condition is met. (If that were the extent of the probability determination, an anticipatory warrant could be issued for every house in the country, authorizing search and seizure *if* contraband should be delivered—though for any single location there is no likelihood that contraband will be delivered.) Rather, the probability determination for a conditioned anticipatory warrant looks also to the likelihood that the condition will occur, and thus that a proper object of seizure will be on the described premises. In other words, for a conditioned anticipatory warrant to comply with the Fourth Amendment's requirement of probable cause, two prerequisites of probability must be satisfied. It must be true not only that *if* the triggering condition occurs "there is a fair probability that contraband or evidence of a crime will be found in a particular place," *Gates, supra*, at 238, but also that there is probable cause to believe the triggering condition *will occur*. The supporting affidavit must provide the magistrate with sufficient information to evaluate both aspects of the probable-cause determination. See *Garcia, supra*, at 703.

In this case, the occurrence of the triggering condition—successful delivery of the videotape to Grubbs' residence—would plainly establish probable cause for the search. In addition, the affidavit established probable cause to believe the triggering condition would be satisfied. Although it is possible that Grubbs could have refused delivery of the videotape he had ordered, that was unlikely. The

Magistrate therefore "had a 'substantial basis for . . . conclud[ing]' that probable cause existed." *Gates*, 462 U. S., at 238–239 (quoting *Jones* v. *United States*, 362 U. S. 257, 271 (1960)).

III

The Ninth Circuit invalidated the anticipatory search warrant at issue here because the warrant failed to specify the triggering condition. The Fourth Amendment's particularity requirement, it held, "applies with full force to the conditions precedent to an anticipatory search warrant." 377 F. 3d, at 1077–1078.

The Fourth Amendment, however, does not set forth some general "particularity requirement." It specifies only two matters that must be "particularly describ[ed]" in the warrant: "the place to be searched" and "the persons or things to be seized." We have previously rejected efforts to expand the scope of this provision to embrace unenumerated matters. In *Dalia* v. *United States*, 441 U. S. 238 (1979), we considered an order authorizing the interception of oral communications by means of a "bug" installed by the police in the petitioner's office. The petitioner argued that, if a covert entry is necessary to install such a listening device, the authorizing order must "explicitly set forth its approval of such entries before the fact." *Id.*, at 255. This argument fell before the "'precise and clear'" words of the Fourth Amendment: "Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that, in addition to the [requirements set forth in the text], search warrants also must include a specification of the precise manner in which they are to be executed." *Id.*, at 255 (quoting *Stanford* v. *Texas*, 379 U. S. 476, 481 (1965)), 257. The language of the Fourth Amendment is likewise decisive here; its particularity requirement does not include the conditions precedent to execution of the warrant.

Respondent, drawing upon the Ninth Circuit's analysis below, relies primarily on two related policy rationales. First, he argues, setting forth the triggering condition in the warrant itself is necessary "to delineate the limits of the executing officer's power." Brief for Respondent 20. This is an application, respondent asserts, of the following principle: "[I]f there is a precondition to the valid exercise of executive power, that precondition must be particularly identified on the face of the warrant." *Id.*, at 23. That principle is not to be found in the Constitution. The Fourth Amendment does not require that the warrant set forth the magistrate's basis for finding probable cause, even though probable cause is the quintessential "precondition to the valid exercise of executive power." Much less does it require description of a triggering condition.

Second, respondent argues that listing the triggering condition in the warrant is necessary to "'assur[e] the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.'" *Id.*, at 19 (quoting *United States* v. *Chadwick*, 433 U. S. 1, 9 (1977)). The Ninth Circuit went even further, asserting that if the property owner were not informed of the triggering condition, he "would 'stand [no] real chance of policing the officers' conduct.'" 377 F. 3d, at 1079 (quoting *Ramirez* v. *Butte-Silver Bow County*, 298 F. 3d 1022, 1027 (CA9 2002)). This argument assumes that the executing officer must present the property owner with a copy of the warrant before conducting his search. See 377 F. 3d, at 1079, n. 9. In fact, however, neither the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure imposes such a requirement. See *Groh* v. *Ramirez*, 540 U. S. 551, 562, n. 5 (2004). "The absence of a constitutional requirement that the warrant be exhibited at the outset of the search, or indeed until the search has ended, is . . . evidence that the requirement of particular description

does not protect an interest in monitoring searches." *United States* v. *Stefonek*, 179 F. 3d 1030, 1034 (CA7 1999) (citations omitted). The Constitution protects property owners not by giving them license to engage the police in a debate over the basis for the warrant, but by interposing, *ex ante*, the "deliberate, impartial judgment of a judicial officer . . . between the citizen and the police." *Wong Sun* v. *United States*, 371 U. S. 471, 481–482 (1963), and by providing, *ex post*, a right to suppress evidence improperly obtained and a cause of action for damages.

* * *

Because the Fourth Amendment does not require that the triggering condition for an anticipatory search warrant be set forth in the warrant itself, the Court of Appeals erred in invalidating the warrant at issue here. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 04–1414

UNITED STATES, PETITIONER *v.* JEFFREY GRUBBS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[March 21, 2006]

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, concurring in part and concurring in the judgment.

I agree with the Court that anticipatory warrants are constitutional for the reasons stated in Part II of the Court's opinion, and I join in the disposition of this case. But I would qualify some points made in Part III.

The Court notes that a warrant's failure to specify the place to be searched and the objects sought violates an express textual requirement of the Fourth Amendment, whereas the text says nothing about a condition placed by the issuing magistrate on the authorization to search (here, delivery of the package of contraband). That textual difference is, however, no authority for neglecting to specify the point or contingency intended by the magistrate to trigger authorization, and the government should beware of banking on the terms of a warrant without such specification. The notation of a starting date was an established feature even of the objectionable 18th-century writs of assistance, see, *e.g.*, Massachusetts Writs of Assistance Bill, 1762, reprinted in M. Smith, The Writs of Assistance Case 567–568 (1978); Writ of Assistance (English) of George III, 1761, reprinted in *id.*, at 524–527. And it is fair to say that the very word "warrant" in the Fourth Amendment means a statement of authority that sets out the time at which (or, in the case of anticipatory warrants,

the condition on which) the authorization begins.*

An issuing magistrate's failure to mention that condition can lead to several untoward consequences with constitutional significance. To begin with, a warrant that fails to tell the truth about what a magistrate authorized cannot inform the police officer's responsibility to respect the limits of authorization, see *Groh* v. *Ramirez,* 540 U. S. 551, 560–563, 561, and n. 4 (2004), a failing assuming real significance when the warrant is not executed by the official who applied for it and happens to know the unstated condition. The peril is that if an officer simply takes such a warrant on its face and makes the ostensibly authorized search before the unstated condition has been met, the search will be held unreasonable. It is true that we have declined to apply the exclusionary rule when a police officer reasonably relies on the product of a magistrate's faulty judgment or sloppy practice, see *Massachusetts* v. *Sheppard,* 468 U. S. 981, 987–991 (1984). But when a government officer obtains what the magistrate says is an anticipatory warrant, he must know or should realize when it omits the condition on which authorization depends, and it is hard to see why the government should not be held to the condition despite the unconditional face of the warrant. Cf. *Groh* v. *Ramirez, supra,* at 554–555, 563, and n. 6 (declaring unconstitutional a search conducted pursuant to a warrant failing to specify the items the government asked the magistrate permission to seize in part because "officers leading a search team must 'make sure that they have a proper warrant that in fact authorizes the search and seizure they are about to conduct'" (brackets omitted)).

Nor does an incomplete anticipatory warrant address an

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*Federal Rule of Criminal Procedure 41(e)(2)(A) in fact requires that an issued warrant command the executing officer to "execute the warrant within a specified time no longer than 10 days."

owner's interest in an accurate statement of the government's authority to search property. To be sure, the extent of that interest is yet to be settled; in *Groh* v. *Ramirez, supra*, the Court was careful to note that the right of an owner to demand to see a copy of the warrant before making way for the police had not been determined, *id.*, at 562, n. 5, and it remains undetermined today. But regardless of any right on the owner's part, showing an accurate warrant reliably "assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *United States* v. *Chadwick*, 433 U. S. 1, 9 (1977), quoted in *Groh* v. *Ramirez, supra*, at 561. And if a later case holds that the homeowner has a right to inspect the warrant on request, a statement of the condition of authorization would give the owner a right to correct any misapprehension on the police's part that the condition had been met when in fact it had not been. If the police were then to enter anyway without a reasonable (albeit incorrect) justification, the search would certainly be open to serious challenge as unreasonable within the meaning of the Fourth Amendment.